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SEABORNE'S
Vendors & Purchasers of Real Property.

FIFTH EDITION.

SEABORNE'S
VENDORS AND PURCHASERS

BEING

A CONCISE MANUAL

OF THE LAW RELATING TO

VENDORS AND PURCHASERS

OF

REAL PROPERTY

BY

W. ARNOLD JOLLY, M.A.

OF LINCOLN'S INN, BARRISTER-AT-LAW

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PREFACE TO FIFTH EDITION

THE favourable reception accorded to the Fourth Edition of "Seaborne's Vendors and Purchasers" encourages me to hope that this short treatise has been found of practical utility by the legal profession. Some slight increase in the size of the book has been rendered necessary, as well by the unusually large number of decisions affecting vendors and purchasers which have been reported during the last four years, as by the important changes which have been made by the legislature in the law relating to the descent and transfer of land. Points arising out of Registration of Title will, it is believed, be found treated of in the appropriate places; but I have for the most part acted upon the assumption, which seems fully justified by the existing practice, that for many years to come only possessory titles will be registered. In deference to the suggestions of

my critics, the arrangement of the book has been recast so as to commence the subject with the Contract of Sale, and a considerable portion of what remained of Mr. Seaborne's work has been re-written.

In conclusion, I have to thank Mr. F. M. B. **CARTER**, of Lincoln's Inn, barrister-at-law, for his assistance in the passage of this book through the press.

W. A. J.

2 NEW COURT,
LINCOLN'S INN.
November 1900.

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A D D E N D A

Page 10, note (tt), “*Manchester Ship Canal v. Manchester Racecourse Company*, (1900) 2 Ch. 352.”

Page 34, line 7, for “*habitio rati*” read “*ratihabitio*.”

Page 46, note (b), add, “*Re Haalen*, (1898) 2 Ch. 220.”

Page 58, note (p), add, “*Bird v. Philpott*, (1900) 1 Ch. 822.”

Page 106, at end of the last paragraph, add, “and also all expenses incident to the investigation, deduction, and verification of title.”

Page 152, line 14, for “this section” read “section 2 of the Act of 1833.”

Page 224, note (s), “*Jacob v. Revell*, (1900) 2 Ch. 858.”

Page 255, note (j), “*Re Hare and O'More*, (1901) 1 Ch. 93.”

Page 313, note (d), “*Re Tyrrell*, 82 L.T. 675.”

Page 376, note (nn), “*Hunt v. Luck*, (1901) 1 Ch. 45.”

INTRODUCTION TO THE SUBJECT

IT is perhaps an impossible task to arrange a work on the Law of Vendors and Purchasers upon a strictly logical basis.

You may, of course, approach the subject from the point of view either of the Vendor or of the Purchaser. The Vendor, if he is prudent, does not enter into a binding contract until he has considered his own capacity to sell, the nature of his title, and the evidence by which that title must be proved. If, as is commonly the case, he finds flaws in his title to the property which he proposes to sell, he declines to enter into an "open contract," under which he would be bound to show a good title for forty years, but inserts special stipulations which are intended to meet the objections of the Purchaser.

On the other hand, from the point of view of the Purchaser, the transaction begins with the contract of sale, and it is not as a rule until after the contract has been entered into that the Purchaser has any opportunity of ascertaining the nature of the Vendor's title. Moreover,

although in the case of sales by auction the Vendor usually prepares his abstract of title before he signs the contract of sale, this is by no means the invariable practice in the case of sales by private treaty. The Vendor not unfrequently neglects "to look before he leaps," and does not consult his solicitor as to the nature of his title until after he has bound himself by a contract to sell, entered into by himself personally, or by some agent whom he has employed. It seems, therefore, more in accordance with what is in practice the usual sequence of events to determine in the first place whether there has been a binding contract of sale before we enter into the consideration of how that contract must be carried into effect.

We shall therefore first consider what constitutes a contract; secondly, how that contract must be evidenced in order to comply with the Statute of Frauds; thirdly, what the contract should disclose in order that it may not be voidable by the Purchaser; and fourthly, we shall consider those cases in which Vendor or Purchaser is under disability, or has only a limited capacity to sell or purchase land. When these preliminary matters have been concluded, we shall deal with investigation of title, the means by which the contract can be enforced, and the manner in which completion should be carried out.

THE LAW

RELATING TO

Vendors & Purchasers of Real Property.

PART I.

THE CONTRACT OF SALE.

CHAPTER I.

WHAT CONSTITUTES A CONTRACT.

SECTION 1.

The Parties must be ad idem.

A CONTRACT for the sale of land may be constituted by a formal agreement in writing, or by a number of informal documents, such as letters, or even by a parol agreement, provided that it is sufficiently evidenced in writing, so as to satisfy the Statute of Frauds (*a*).

It must be borne in mind that the Statute of Frauds is a weapon of *defence*, and not of *offence*, and does not make a signed document, which complies with its provisions, a

(*a*) 29 Car. 2, c. 3.

valid contract, if it is not such, "according to the good faith and real intentions of the parties" (b). An agreement is the result of the mutual assent of two parties to certain terms, and if it be clear that there is no consensus, what may have been written or said becomes immaterial (c). The first question in every case must therefore be, whether there has in fact been a concluded agreement between the parties, or whether what has passed amounted to nothing more than a treaty.

SECTION 2.

Certainty of Subject Matter and of the Terms of the Contract

✓ In order to establish a contract for the sale of land, it is necessary to show both certainty as to the subject matter of the contract, and certainty that the terms of sale were agreed to.

Uncertainty of Subject Matter.—If the subject matter of a contract is too vague, there is no binding agreement. Thus where the vendor reserved "the necessary land for making a railway through the estate to Prince Town," Jessel, M.R., said: "I neither know what is the amount of land necessary for a railway, nor what line the railway is to take, and therefore I cannot enforce specific performance of the contract" (d). But when the subject matter

(b) *Jervis v. Berridge*, 8 Ch. 360.

(d) *Pearse v. Watts*, 20 Eq. 492;

(c) *Chinnock v. Marchioness of Ely*, 4 D. J. & S. 643.

Lindsay v. Lynch, 2 Sch. & Lef.

is capable of ascertainment, mere uncertainty as to the measurement of the land is not necessarily fatal (*e*).

Uncertainty of Terms.—Upon the same principle a contract is not void for uncertainty where the price is to be fixed by valuation, and in that case, if the parties have not appointed any persons to make the valuation, the Court will interfere so as to ascertain the value in order to direct a specific performance (*f*). Moreover, if all the *essential* terms of an agreement for the sale of land have been determined, the fact that some minor details are left unsettled will not, in the case of an informal memorandum, prevent the contract from being held binding (*g*).

Thus it is not uncommon on a sale of real estate that the time for completion should not be fixed, and if no time is fixed, the inference is, that the completion will be within a reasonable time (*h*). Consequently, where a purchaser in accepting an offer said: "I should like to know from what time the vendor wishes the purchase to date," it was held by the Court of Appeal that there was, nevertheless, a complete contract (*i*). If, however, the contract is for the sale of the *goodwill* of a business, in addition to the

(*e*) *Jenkins v. Green*, 27 Beav. 487; *Sanderson v. Cockermouth Railway Company*, 11 Beav. 497; and cf. decisions of Kekewich, J., in *Wylson v. Dunn*, 34 C. D. 569; *North v. Percival*, 1898, 2 Ch. 128.

(*f*) *Wilks v. Davis*, 3 Mer. 509; and cf. *Marsh v. Jones*, 40 C. D. 563.

(*g*) *Cayley v. Walpole*, 39 L. J.

Ch. 609; *Gray v. Smith*, 43 C. D. 219-220. "When a memorandum is intended to be worked out by a formal document, it is not necessary that every stipulation which would be contained in the latter document shall be indicated."

(*h*) *Gray v. Smith*, 43 C. D. 214.

(*i*) *Simpeon v. Hughes*, 76 L. T. 237.

sale of real estate, the time for completion is one of the essential terms of the contract (*j*).

SECTION 3.

Offer and Acceptance.

An offer to buy or sell land may be revoked at any time prior to acceptance, and this is so, even where there is a promise to keep the offer open until a particular date (*k*), unless this promise is founded on a valuable consideration (*l*).

The revocation of an offer, however, is of no effect until it is *communicated*, i.e., brought to the mind of the person to whom it was made (*m*). Where an offer is made and accepted by *letters sent through the post*, the contract is completed the moment the letter accepting the offer is posted (*n*) ; and the rule is the same whenever the circumstances are such that it must have been within the contemplation of the parties that the post might be used as a means of communicating the acceptance (*o*).

On the other hand, the revocation of an offer, if sent by post, does not take effect from the time of posting, but from the time that it is received by the other party (*p*).

- (*j*) *Dennison v. People's Café Company*, 45 L. T. 187; *May v. Thompson*, 20 C. D. 705.
(*k*) *Cook v. Oxley*, 3 T. R. 653; *Dickinson v. Dodds*, 2 C. D. 463; *Routledge v. Grant*, 4 Bing. 653.
(*l*) *Reichel v. Bishop of Oxford*, 35 C. D. at p. 68.
(*m*) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Henthorn v. Fraser*, (1892) 2 Ch. at p. 33.
(*n*) *Dunlop v. Higgins*, 1 H. L. C. 381; *Household Fire Co. v. Grant*, 4 Ex. D. 216.
(*o*) *Henthorn v. Fraser*, (1892) 2 Ch. at p. 33.
(*p*) *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Henthorn v. Fraser*, (1892) 2 Ch. 27.

Contract contained in Letters.—Where it is sought to make out a binding contract from a number of letters, it is necessary to look at *the whole correspondence* (*q*). “ You must not at one particular time draw a line and say, ‘ We will look at the letters up to this point, and find in them a contract or not, but we will look at nothing beyond ’ ” (*r*).

Thus, two letters, which, if they stood alone, would be evidence of a sufficient contract, may be shown by subsequent correspondence not to have contained all the terms of the contract (*s*). On the other hand, if the two letters had constituted a completed agreement, this agreement cannot be affected by the re-opening of negotiations between the parties in subsequent letters, unless those negotiations amount to a rescission of the contract by mutual consent (*t*).)

Acceptance must be Unqualified.—If a person in accepting an offer introduces any new or different term into the proposed agreement, this variation must be acceded to by the other party before there is a concluded contract. Thus, where the purchaser offered to buy the assignment of a lease on certain terms, and the vendor in his reply did not consent to assign the lease, but offered to grant an underlease upon precisely the same terms, and with the same clauses as the lease, it was held that there had been no acceptance (*u*). So, too, where the vendor's solicitor

(*q*) *Hussey v. Horne-Payne*, 4 A. C. 311.

(*r*) *Hussey v. Horne-Payne*, 4 A. C. at p. 316.

(*s*) *Bristol, Cardiff & Swansea Aerated Bread Co. v. Maggs*, 44 C. D. 616; *Williams v. Briscoe*,

22 C. D. 441.

(*t*) *Hussey v. Horne-Payne*, 4 A. C. at p. 321; *Bellamy v. Debenham*, 45 C. D. 481; *Mason v. Von Buch*, 15 T. L. R. 420.

(*u*) *Holland v. Eyre*, 2 S. & S. 194.

wrote a letter accepting the purchaser's offer, but enclosing a contract containing terms which had not been referred to in the offer, the Court held that there was no binding agreement (*v*). Though the refusal by the offeror of a distinct counter-offer by the offeree puts an end to the offeror's original offer, (*w*), yet, if the counter proposal merely amounts to an inquiry whether the offeror will modify his terms, it does not operate as a rejection (*x*).

Acceptance, subject to a Condition.—Upon the same principle, there is no contract if the acceptance is made subject to a condition. For instance, where a proposed under-lessee signed a memorandum with the qualification that he agreed thereto, subject to there being nothing unusual in the leases of the ground landlord, he was held not to be bound (*y*). An acceptance, "subject to the title being approved by my solicitor," is not conditional (*z*), but the vendor, if he seeks to enforce specific performance, must prove either that his title was in fact approved, or that there was such a title tendered as made it unreasonable not to approve it (*a*). If the acceptance is subject to approval of title and *terms of contract*, there is no binding agreement, since the terms are left uncertain (*b*). A person who accepts an offer subject to a condition *which is solely for his own benefit*, may waive the condition and

(*v*) *Jones v. Daniel*, (1894) 2 Ch. 832; *Crossley v. Maycock*, 18 Eq. 180.

(*w*) *Hyde v. Wrench*, 3 Bea. 384.

(*x*) *Stevenson v. Maclean*, 5 Q. B. D. 346.

(*y*) *Lucas v. James*, T. Hare, 410.

(*z*) *Hussey v. Horne-Payne*, 4 A. C. 322.

(*a*) *Clack v. Wood*, 9 Q. B. D. 280.

(*b*) *Chatterly v. Nicholls*, 1 T. L. R. 14.

enforce specific performance in the terms of the offer (*c*); but the waiver must be made by the plaintiff before the defendant has repudiated the contract, otherwise the parties are never *ad idem* (*d*). If, however, the condition is intended to be for the benefit of *both* the parties (*e*), or for the benefit of the other party (*f*), it cannot be waived by the party who seeks to enforce the contract. Thus where what appears to be an agreement is expressed to be "subject to a formal contract being prepared and signed by both parties as approved by their solicitors," this stipulation must be regarded as a condition precedent (*g*).)

"Parties often enter into a negotiation meaning that when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if, on seeing the result in that shape, they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that, though it may represent what he said, *it does not represent what he meant to say*" (*h*).

But where the formal contract is not *expressly* made a condition precedent of the acceptance, it is a question of construction whether the parties had really come to

(*c*) Cf. *North v. Percival*, (1898) 2 Ch. 132.

(*d*) *Moritz v. Knowles*, (1899) W. N. 83.

(*e*) *Lloyd v. Nowell*, (1895) 2 Ch. 744.

(*f*) *Chinnock v. Marchioness of Ely*, 4 De G. J. & S. 638.

(*g*) *Winn v. Bull*, 7 C. D. 29;

Hawksworth v. Chaffey, 55 L. J. Ch. 335; *Harvey v. Barnard's Inn*,

50 L. J. Ch. 150; *Page v. Norfolk*, 70 L. T. 782; *Cook v. Williams*,

14 T. L. R. 31.

(*h*) Per Lord Blackburn, in *Rossiter v. Miller*, 3 A. C. at p. 1152.

a final agreement, although they were subsequently to have a formal document drawn up.

If there are grounds for inferring that all the essential terms of the contract shall not be treated as settled, but other terms are intended to be inscribed in what is called the formal contract, there is no contract until what is called the formal contract is signed (*i*).

On the other hand, as stated by Lord Hatherley in *Rossiter v. Miller* (*j*): "If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say we will have this agreement put into due form by a solicitor." Thus, if the vendor writes accepting the purchaser's offer, but adds that he has requested his solicitors "to forward you the agreement for purchase" (*k*), or has asked his solicitors "to prepare contract" (*l*), or directs his attorney to "prepare a proper agreement for both parties to sign" (*m*), there is, nevertheless, a binding agreement between the parties, for no new term can be introduced into the formal contract, and the purchaser, if he signs the contract, will not have agreed to anything more than he has already agreed to (*n*). On the other hand, when the purchaser wrote "send me

(*i*) *Dennison v. People's Café*, 45 L. T. 187.

(*j*) 3 A. C. at p. 1143; and cf. judgment of Lord Cairns, at pp. 1137, 1138.

(*k*) *Rossiter v. Miller*, 3 A. C. 1124.

(*l*) *Bonnewell v. Jenkins*, 8 C. D.

70.

(*m*) *Fowle v. Freeman*, 9 Ves. 351.

(*n*) *Lewis v. Brass*, 3 Q. B. D. 667.

the contract and I will get it signed" (*o*), or "please instruct your solicitor to forward the contract to me" (*p*), it has been held that the letter was not meant to complete the contract.

Where, however, instead of referring to a more formal document to be drawn up *in the future*, the vendor in his letter of acceptance actually encloses a formal contract for the purchaser's signature, the decision must depend on whether this contract contains any special terms which have not already been agreed upon. If it does not contain any new term, the agreement will be binding, although the formal document remains unsigned (*q*).

SECTION 4.

Options of Purchase.

Where an option of purchase of real estate has been created either by contract (as in the case of partnership deeds and leases) or under the provisions of a will, the conditions imposed upon the exercise of the option are always strictly construed (*r*). All precedent conditions must be fulfilled by the purchaser before any contract binding the vendor can arise (*s*). A sufficient notice of

(*o*) *Goodall v. Harding*, 52 L. T. 127.

(*p*) *Hucklesby v. Hook*, 82 L. T. 117.

(*q*) *Gibbins v. Board of Management of Metropolitan Asylum District*, 11 Beav. 1, where, however, the enclosed contract was not put

in evidence; see also *Crossley v. Maycock*, 18 Eq. 180; *Jones v. Daniel*, (1894) 2 Ch. 332; *Filby v. Hounsell*, (1896) 2 Ch. at p. 742.

(*r*) *Dart, V. & P.* p. 240.

(*s*) *Weston v. Collins*, 11 Jur. N.S. 190.

intention to exercise the option must be given *within the prescribed time*, and time is of the essence of the contract (*t*). An option to purchase or right of pre-emption must be so limited as not to be obnoxious to the rule against perpetuities unless the right is expressly conferred by statute (*tt*).

An option in a lease for the lessee, his executors, administrators, or *assigns*, to purchase the reversion, is attached to the lease, and passes with it, the word *assigns* meaning *assigns of the term* (*u*). An equitable assignee of a lease cannot exercise an option to purchase the reversion (*uu*). If an option of purchase is not exercised until after the death of the person who created the option, notice of intention to exercise the option should be given to both the real and personal representatives (*v*). According to the principle laid down in *Lawes v. Bennett* (*w*), the purchase-money forms part of the personal estate of the person creating the option, unless he has in his will indicated an intention to exclude the operation of this rule (*x*).

(*t*) *Bird v. Brown*, 4 Ex. 786; *Holland v. King*, 6 C. B. 727; *Dibbins v. Dibbins*, (1896) 2 Ch. 348.

(*tt*) *London and S. W. Ry. v. Gomm*, 20 C. D. 562; *Manchester Ship Canal v. Manchester Race-course Co.*, (1900) W. N. 34.

(*u*) *Adams v. Kensington Vestry*,

27 C. D. 394.

(*uu*) *Friary Holroyd & Co. v. Singleton*, (1899) 1 Ch. 86.

(*v*) Cf. *Re Isaacs*, (1894) 3 Ch. 506, where notice was given both to the heir-at-law and the administrator.

(*w*) 1 Cox, 167.

(*x*) *Re Pyle*, (1895) 1 Ch. 724.

CHAPTER II.

HOW THE CONTRACT MUST BE EVIDENCED.

IT is enacted by the fourth section of the Statute of Frauds (*a*) that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or interest in or concerning them (*b*), unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised.

SECTION 1.

The Signature.

It is to be observed that the contract need only be signed *by the party to be charged*, and it was established in the leading case of *Seton v. Slade* (*c*) that an agreement signed by one party only is good to charge him within the

(*a*) 29 Car. 2, c. 3.

(*b*) Cf. *Jarris v. Jarvis*, (1893) W. N. 138, where certain machinery was held to be an interest in land within this section. As to trees and growing produce, see *Smith v. Surman*, 9 B. & C. 561; *Marshall*

v. *Green*, 1 C. P. D. 35. As to "building materials" of a house, see *Lavery v. Pursell*, 39 C. D. 503. See also learned article in 2 Jur. N.S. Part II. p. 71.

(*c*) White & Tudor's L. C., Vol. II. 475, and notes thereto.

Statute of Frauds. Moreover, where an *offer* in writing signed by one party contains the terms which he proposes as an agreement, the other party may accept *by parol*, e.g., by conduct, for the statute only requires a "memorandum in writing," and not an "agreement in writing" (*d*). The signature may be printed or stamped (*e*), and there is no necessity for the signature to be at the foot of the memorandum, but it may be at the beginning or in the body of the document (*f*).

Intention in signing.—Moreover, "the question is not one of the intention of the party who signs the document, but simply of evidence against him. The Court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it. Any document signed by him and containing the terms of the contract is sufficient for that purpose" (*g*). Consequently, *provided there is a concluded agreement*, it is immaterial that the writing which is relied on as a memorandum of the agreement for the purpose of the Statute of Frauds was signed *alio intuitu* (*h*). Thus a letter written by the vendor to a third party, containing directions to carry the agreement into execution, is a sufficient memorandum, and

(*d*) *Reuss v. Picksley*, L. R., 1 Ex. 342, explained by Cotton, L. J., in *New Eberhardt Co.*, 43 C. D. at p. 127; see also *Filby v. Hounsell*, (1896) 2 Ch. at p. 740.

(*e*) *Schneider v. Norris*, 2 M. & S. 286.

(*f*) *Evans v. Hoare*, (1892) 1 Q. B. 595; *Bleakley v. Smith*, 11 Sim.

150; but cf. *Hucklesby v. Hook*, 82 L. T. 117.

(*g*) *Per Lord Bowen in Hoyle v. Hoyle*, (1893) 1 Ch. 99.

(*h*) This doctrine is now fully established, and many of the cases cited by Dart, p. 272, require re-consideration.

so also is a letter which contains an admission of the bargain, and all the essential terms of it, notwithstanding that the writer repudiated his liability (*i*). Again the signature of the chairman of a company affixed to the minute book for the purpose of verifying an entry therein may constitute a memorandum which satisfies the requirements of the Statute (*j*); and it has been held by Kekewich, J., that a signed engrossment of a lease, although only delivered as an escrow, is sufficient evidence of an agreement (*k*).

SECTION 2.

Identification of Contracting Parties and Subject Matter.

The Contracting Parties.—The names of *both* the contracting parties must be specified in the agreement, or there must be such a description of them as to establish their identity, and the Court will not "be astute to discover descriptions which a jury could not identify" (*l*).

Thus, if one of the contracting parties is simply described as "the vendor" (*m*), or as "my client," "my principal," or "my friend" (*n*), or as "the landlord" (*o*), the contract cannot be enforced. On the other hand,

(*i*) See cases cited in *Gibson v. Holland*, L. R., 1 C. P., at p. 6.

variably recites the contract of sale.

(*j*) *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314.

(*l*) *Commins v. Scott*, 20 Eq. 11.

(*k*) *Moritz v. Knowles*, (1899) W. N. 40, *sed quare*. The case would be far stronger with respect to a conveyance which almost in-

(*m*) *Potter v. Duffield*, 18 Eq. 4.

(*n*) *Rossiter v. Miller*, 3 A. C. 1141.

(*o*) *Coombs v. Wilkes*, (1891) 3 Ch. 77.

"proprietor" (*p*) is a sufficient description, and so also is "owner," "mortgagee" (*q*), and "trustee for sale" (*r*), and where it appeared from the conditions of sale that the vendor was a company in possession of the property, that was held to be enough (*s*).

It is sufficient for the purpose of satisfying the Statute of Frauds that the written contract should disclose the names of the actual contracting parties, although they may be agents for undisclosed principals. Who the principals are may be proved by parol evidence (*t*).

Not only is it necessary that the identification of the parties should be found in the written memorandum, but it is also essential that the intention to sell should be expressed, and that the subject-matter, the price, and all other essential terms of the contract should be determined thereby (*u*).

The Subject Matter.—With regard to the identification of the property which is to be sold, a very general description is sufficient to satisfy the statute. Thus it is enough to describe the property as having been sold on a given day at a given place by a particular person (*v*); and it appears that "all that farm formerly in the tenancy of A. which was devised by B. to C." would be a sufficient description, even though the farm was not mentioned

(*p*) *Sale v. Lambert*, 18 Eq. 1.

(*q*) *Jarrett v. Hunter*, 34 C. D. 182.

(*r*) *Catling v. King*, 5 C. D. 660.

(*s*) *Commens v. Scott, supra*. Cf. also *Carr v. Lynch*, (1900) W. N. 69.

(*t*) *Morris v. Wilson*, 5 Jur., N.S.

168; *Filby v. Hounsell*, (1896) 2 Ch. 737.

(*u*) *Skelton v. Cole*, 5 D. G. & J.

587.

(*v*) *Shardlow v. Cotterell*, 20 C. D. 94.

in the will and passed as part of the residue (*w*). So in the case of *Ogilvie v. Foljambe* (*x*) "Mr Ogilvie's house," and in the case of *Bleakley v. Smith* (*y*), the "property in Cable Street," "a plot situate near Church St., Cromer" in *Sidle v. Bond-Cibbell* (*z*), and "twenty-four acres of land at Totmonstow" in *Plant v. Bourne* (*a*) were held to be sufficient descriptions. In these cases parol evidence is admitted to show what property was intended.

The Price.—The price at which the property is to be sold must either be fixed by the contract, or the means of compulsorily fixing it must be provided (*b*); but a contract to sell "at a fair valuation" has been enforced (*c*).

SECTION 3.

Connecting Documents.

The terms of the contract need not all appear on the instrument signed by the party to be charged, but may be contained in two or more pieces of paper, but they must be *so connected that you can read them together* so as to form one memorandum of the contract between the parties.

The difficulty which arises in cases of this kind is

(*w*) *Shardlow v. Cotterell*, 20 C. D. 95.

(*x*) 3 Mer. 53, approved by Lord Davey, in *Bank of New Zealand v. Simpson*, 82 L. T. 100.

(*y*) 11 Sim. 150.

(*z*) 2 T. L. R. 44.

(*a*) (1897) 2 Ch. 281, and see

cases collected in judgment of Chitty, L. J., in *Shears v. Thimbleby*, 76 L. T. 712.

(*b*) *Lord Middleton v. Wilson*, Sugd. 135.

(*c*) *Dart, V. & P.* 257; *Marsh v. Jones*, 40 C. D. 563.

whether parol evidence can be given to connect the various documents together. The law, as laid down by Kekewich, J., in *Oliver v. Hunting* (*d*), is "that if you can find a *reference* to *something*, which may be a conversation, or may be a written document, you may give (parol) evidence to show whether it was a conversation or a written document, and having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved." Thus if A. writes to B. saying that he will give 1000*l.* for B.'s estate, and stating the terms in detail, and B. simply writes back, "I accept your *offer*," you may show by parol evidence that the offer alluded to by B. is that made by A. (*e*).

So where a letter signed by the defendant referred to "our *arrangement* to hire a carriage," parol evidence was admitted to prove that the only arrangement to which he could have referred was a written memorandum signed by the plaintiff and setting forth the terms of the contract (*f*). Again where "*instructions*" were referred to, it was held that it might be shown by parol evidence that the instructions had been given in writing, and that there had been no other instructions than the written document which was produced (*g*).

Parol evidence has been admitted to show that two documents dealing with the same matter were contained in the same envelope (*h*), and to connect a letter addressed

(*d*) 44 C. D. at p. 208.

(*e*) *Per Bramwell, L. J.*, in *Long v. Millar*, 4 C. P. D. 454.

1,125.

(*g*) *Ridgway v. Wharton*, 27

L. J., Ch. 46.

(*h*) *Kronheim v. Johnson*, 7 C. D.

60.

"dear sir" with the direction on the envelope in which it was sent (*hh*).

One of the strongest cases as to connecting documents is *Long v. Millar* (*i*). In that case the vendor signed a deposit receipt containing the name of the purchaser and the amount of the deposit, which was referred to as a deposit "on the *purchase* of three plots of land at Hammersmith." The Court of Appeal held that the words referring to the purchase were sufficient to incorporate a memorandum of agreement signed by the purchaser, and that the two formed a written contract which satisfied the statute. This decision has been followed by North, J., in *Studds v. Watson* (*j*), by Kekewich, J., in *Oliver v. Hunting* (*k*), and by the Court of Appeal in *Shears v. Thimbleby* (*l*).

SECTION 4.

Part Performance.

A contract which fails to comply with the requirements of the Statute of Frauds is not *void*, but merely unenforceable.

The statute simply bars the legal remedies by which the contract might otherwise be enforced (*m*). But

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| <i>(hh) Pearce v. Gardner</i> , (1897) 1 Q. B. 688. | <i>Potter v. Peters</i> , W. N., (1895) 37. (<i>i</i>) 76 L. T. 709. |
| <i>(i)</i> 4 C. P. D. 450. | <i>(m) Crosby v. Wadsworth</i> , 6 East, 602; <i>Leroux v. Brown</i> , 12 C. B. 801; <i>Britain v. Rosriter</i> , 11 Q. B. D. 123. |
| <i>(j)</i> 28 C. D. 309. | |
| <i>(k)</i> 44 C. D. 205, but see <i>contra</i> , <i>Coombes v. Wilkes</i> , (1891) 3 Ch. 77; | |

when the contract has been partly performed by the parties thereto, and acts have been done which must, of their nature, be referable to the contract, equities arise which cannot be administered unless the contract is regarded.

In such a case the Court has jurisdiction, notwithstanding the Statute of Frauds, to inquire into the actual contract which has been made, and, having discovered by parol evidence the terms of that contract, to enforce its performance (*n*).

This is the equitable doctrine of part performance.

Possession.—The commonest application of this doctrine is where a purchaser under a parol contract is let into possession of the property before completion. The Court finding a stranger in acknowledged possession of the land, who would, *prima facie*, be a trespasser, can only explain his being there by the supposition of an *antecedent* contract (*o*). If the entry into possession was prior to the contract, it cannot be regarded as an act of part performance (*p*), but the subsequent *continuance in possession* may, under certain circumstances, constitute an act of part performance (*q*).

An act, in order to amount to part performance, must be *unequivocal*, and an act which, though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to consti-

(*n*) See *Maddison v. Alderson*, 8 A. C. pp. 475, 476; see also *Lester v. Foxcroft*, and notes thereon, White & Tudor's Leading Cases, Vol. II. 460.

(*o*) *Morphett v. Jones*, 1 Sw. 181.

It is essential that possession should be delivered according to the contract, and *not obtained wrongfully*.

(*p*) *Parker v. Smith*, 1 Coll. 623.

(*q*) *Hodson v. Henland*, (1896) 2 Ch. 428.

tute an act of part performance taking the case out of the Statute of Frauds (*r*).

What amounts to Part Performance.—For this reason the payment of a deposit, or even of the whole purchase-money, is not an act of part performance, since it is not of itself indicative of a contract for the sale of land (*s*). So, too, giving instructions for the conveyance to be drawn and engrossed, and going to take a view of the estate (*t*), making an admeasurement of the property (*u*), or the employment of surveyors to value the timber (*v*), are equivocal acts which do not amount to part performance. The delivery of an abstract, even when accompanied with the deeds, is not sufficient (*w*), but if, after receiving the abstract, the purchaser examines it with the deeds and makes requisitions, it is doubtful whether he could subsequently set up the statute (*x*).

It must also be remembered that the act of part performance must be by the person seeking to enforce the parol agreement (*y*). Part performance by the defendant is of no avail. It should also be borne in mind that the equitable doctrine of part performance cannot be made use of for the purpose of obtaining damages in cases where you could not have specific performance (*z*).

(*r*) *Dale v. Hamilton*, 5 Hare, 381.

(*s*) *Clinan v. Cooke*, 1 Sch. & Lef. 40; *Hughes v. Morris*, 2 D. M. & G. 356.

(*t*) *Clerk v. Wright*, 1 Atk. 12.

(*u*) *Pembroke v. Thorpe*, 3 Sw. 442, n.

(*v*) *Whitehead v. Brockhurst*, 1 Bro. C. C. 412.

(*w*) *Whalcy v. Bagnall*, 1 Bro. P. C. 345.

(*x*) *Thomas v. Brown*, 1 Q. B. D. at p. 723.

(*y*) *Caton v. Caton*, 1 Ch. at p. 148.

(*z*) *Lavery v. Pursell*, 39 C. D. pp. 518 and 519.

SECTION 5.

Fraud.

Apart from the doctrine of part performance, the Court will not, in the words of Lord Justice Gifford, "allow the Statute of Frauds to be made an instrument of fraud." (a) Thus, in *Whitchurch v. Bevis* (b), Lord Thurlow stated that if the agreement is prevented from being put into writing by the fraud of one of the parties, he cannot afterwards shelter himself under the Statute. So, too, it has been held that parol evidence was admissible to prove a fraud where the defendant insisted that a conveyance was absolute which was really intended as a mortgage (c).

For recent applications of this doctrine the reader is referred to *Davis v. Whithead* (d) and *Rochefoucauld v. Bonstead* (e) and the cases there cited.

SECTION 6.

Stamp on Contract of Sale.

If the subject-matter of the contract is of the value of £5 or upwards, and under hand only, the agreement is liable to a stamp duty of 6d. (f). If the agreement is under seal, it cannot be received in evidence unless stamped as a deed. An adhesive stamp must be affixed

- (a) *Heard v. Pilley*, 4 Ch. at p. & J. 16.
433. (d) (1894) 2 Ch. 133.
(b) 2 Bro. C. C. at p. 564, and (e) (1897) 1 Ch. 196.
cf. *Chattock v. Muller*, 8 C. D. (f) Stamp Act, 1891 (54 & 55
177. Vict. c. 39).
(c) *Lincoln v. Wright*, 4 De G.

before signature, and must be cancelled by the person who first executes the agreement (*g*). An *impressed* stamp can be affixed within fourteen days after execution without a penalty by the indulgence of the Commissioners, except where the contract contains a provision that "no objection is to be taken on the ground of insufficiency of stamps on documents executed before the 16th May 1888." After fourteen days an agreement can only be stamped on payment of a penalty of £10 (*h*). If the subject-matter of the contract be an equitable interest, such as an equity of redemption, the contract may be stamped with *ad valorem* duty as a conveyance on sale, in which case the subsequent conveyance will only require a deed stamp (*i*). But this course is neither necessary nor desirable, since a 6d. stamp is sufficient for the purpose either of enforcing specific performance or recovering damages for breach of contract (*j*). A contract by the trustee of a bankrupt for the sale of his real estate is exempt from stamp duty by virtue of sect. 144 of the Bankruptcy Act, 1883 (*k*).

An agreement contained in a series of letters can be proved under one stamp, which may be impressed on any letter of the series (*l*).

A purchaser of several lots at an auction must pay stamp duty in respect of each lot of the value of £5 or upwards, since a separate agreement in respect of each lot is considered to have been entered into (*m*).

(*g*) 54 & 55 Vict. c. 39, ss. 8 and 22.

(*h*) *Ib.* s. 15.

(*i*) *Ib.* s. 59, sub-ss. 1 and 3.

(*j*) *Ib.* s. 59, sub-s. 4.

(*k*) *Fletcher v. Stubbs*, 2 A. & E.

614.

(*l*) *Alpe*, p. 62.

(*m*) *James v. Shore*, 1 Starkie, 426.

CHAPTER III.

THE CONTRACT MUST NOT BE MISLEADING.

SECTION 1.

What the Contract should disclose.

A CONTRACT for the sale of land is a contract *uberrimae fidei*, and consequently should disclose *all that it is material for the purchaser to know*. It is the duty of every vendor to state all the circumstances connected with the property he is selling and the incidents to which it is subject, in such a manner that they can be understood by a person of ordinary intelligence. It is also the duty of the vendor to give notice of adverse claims which are not idle and frivolous (*a*). Unless the contrary is expressed, an agreement to sell land will include the whole of the vendor's interest therein, and such interest will be deemed to be an estate in fee simple free from incumbrances. It will also be presumed to be accompanied by the rights incidental to such an interest, and the rule applies "*cujus est solum ejus est usque ad cœlum et ad inferos*" (*b*).

(*a*) *Heywood v. Malladien*, 25 C. D. 357; *In re Harris and Rawling's Contract*, W. N., (1894) 19. But the vendor need not disclose the fact that notices have been served on him by the local authority, see

Re Leyland & Taylor, 1900, 2 Ch. 1034; *Whittington v. Corder*, 16 Jur. 2 Ch. 58; *Bellamy v. Debenham*, (1891) 1 Ch. 412.

Defects.—All *latent* defects in the estate of which the vendor or his agent may be aware must be disclosed, as, for instance, an easement affecting the property (*c*), or a covenant restricting its user and enjoyment (*d*). *Patent* defects, on the other hand, need not be called to the notice of the purchaser, even though the vendor be acquainted with them.

Vacant Possession.—If an estate be sold subject to a lease, this fact must be expressly stated in the particulars, otherwise the contract will be considered to be for the sale of the property with *vacant possession*. Thus, where an estate, which was subject to leases for lives at a low rent, was described as “now or late in the occupation of Hugh Roberts,” and the conditions provided that, on completion, the purchaser should be “let into the receipt of the rents and profits,” making no mention of *possession*, it was nevertheless held that the purchaser could not be compelled to take the title without compensation (*e*).

Nature of Tenancies.—Moreover, when the property is described as subject to tenancies, if there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, “if you had gone

(*c*) *Heywood v. Mallalieu, supra*; *Ashburner v. Scwell*, (1891) 3 Ch. 405.

(*d*) *Higgins and Hitchman's Contract*, 21 C. D. 95; *Nottingham Patent Brick & Tile Co. v. Butler*, 18 Q. B. D. 778; *Ebsworth and*

Tidy's Contract, 42 C. D. 23; *In re Cox and Neve's Contract*, (1891) 2 Ch. 109.

(*e*) *Hughes v. Jones*, 3 D. F. & J. 307; *Royal Bristol Permanent Building Society v. Bomash*, 35 C. D. 390.

to the tenant and inquired, you would have found out all about it." Thus, to describe a public-house as "now in the occupation of A. B." is misleading if the property is, in fact, subject to a lease to a brewer for eight years (*f*). On the other hand, if the property is described as "let to A. B., a yearly tenant, at £130 per annum," and A. B. has previously given notice to quit, this would be misdescription, since the purchaser would be led to suppose that he was purchasing with the benefit of *continuing* tenancies at fixed rents, whereas he would in fact have to find tenants immediately after the completion of his purchase (*g*). Again, to describe a farm as "*lately* in the occupation of A. B., at the annual rental of £290," would probably be held to be misleading if the vendor knew that nothing like that rent could now be obtained for it (*gg*).

Land-tax and tithe rent-charge are burdens the existence of which is presumed (*h*). Consequently they need not be noticed in the agreement, and a purchaser is bound to take the estate subject to these charges, unless, indeed, the contract states the land tax to have been redeemed, or that the property is free from tithe (*i*). On a sale of copyholds, the fines or customs of the manor need not be stated (*j*), and if it is clear from the contract that the land, though freehold, is held of a manor, it is not necessary to refer to quit rents or heriots which may be a charge thereon.

Underlease.—An underlease must not be described in

(*f*) *Caballero v. Henty*, 9 Ch. 447. 399.

(*g*) *Dimmock v. Hallett*, 2 Ch. at p. 28.

(*gg*) *Ib.* at p. 27.

(*h*) *Dart, V. & P.*, pp. 398 &

(*i*) *Ebsworth and Tidy's Contract*, 42 C. D. 23.

(*j*) *White v. Cuddon*, 8 Cl. & F. 766.

the contract as a lease (*k*); but should the purchaser be aware that the vendor's interest is an underlease only, he will be bound, although the contract describe the interest as a lease (*l*); and where the vendor agreed to sell *all his interest* in a lease, the purchaser was compelled to accept an underlease for a term less by three days than the original term (*m*).

Inspection of Lease.—On the sale of leaseholds, a reasonable opportunity should be afforded the purchaser of *inspecting the lease*, and if this has been done he will be affected with notice of its contents, and cannot complain that the covenants are unusually stringent (*n*). When a lease contains the usual covenant to deliver up the premises in good repair at the end of the term, and any of the demised premises have been removed, the fact should be stated (*o*).

Other Property comprised in Lease.—With regard to leasehold property, it is always one of the most forcible objections to the title, that the premises bought are held *with others* under one and the same lease, at an entire rent and subject to entire covenants. Thus, where the property sold is held with other property at one entire rent (*p*), or where leasehold property which is

(*k*) *Madely v. Booth*, 2 D. G. & S. 718; *Beyfus and Master's Contract*, 39 C. D. 110. Section 4 of the Conveyancing Act, 1892, has not altered this rule, see *Broom v. Phillips*, 74 L. T. 459.

(*l*) *Flood v. Pritchard*, 40 L. T. 873; *Camberwell, &c. Society v. Holloway*, 13 C. D. 754; *Henderson v. Hudson*, 15 W. R. 860.

(*m*) *Waring v. Scotland*, 57 L. J. Ch. 1016.

(*n*) *Reeve v. Berridge*, 20 Q. B. D. 523; *In re Davis and Cavey*, 40 C. D. 601; *Midgley v. Smith*, W. N., (1893) 120; *White and Smith's Contract*, (1896) 1 Ch. 637.

(*o*) *Granger v. Worms*, 4 Camp. 83.

(*p*) *Warren v. Richardson*, 1 Younge, 1.

sold in separate lots is held under one lease (*q*), it is incumbent on the vendor to state that fact in plain and distinct terms. The same rule applies to the case of the sale of an underlease of one of two houses comprised in an original lease common to both, and containing covenants by the lessee to repair, etc. (*r*).

SECTION 2.

Construction of Particular Expressions used in Contracts for the Sale of Land.

It may be convenient to examine the construction which has been put on particular expressions employed in contracts for the sale of land.

An *underlease* generally means an underlease of the whole premises comprised in the original lease; while a *derivative* lease is a lease derived from the original lease, but only comprising part of the property (*s*).

A brick-built house is understood to mean a house brick-built in the ordinary sense of the word, not composed externally partly of brick and partly of timber and lath and plaster (*t*).

“Clear yearly rent” is understood to mean a rent free from all deductions usually paid by a tenant, but subject to such as are borne by a landlord, such as land-tax (*u*).

(*q*) *Sheard v. Venables*, 36 L. J. Ch. 922. It is presumed the rule would apply even where one purchaser bought all the lots, since he might wish to re-sell them separately.

(*r*) *Darlington v. Hamilton, Kay, 550.* The rule is not affected by

sect. 14 of the C. A. 1881, or sect. 4 of the C. A. 1892, cf. *Cresswell v. Davidson*, 56 L. T. 811.

(*s*) *Brumfit v. Morton*, 3 Jur. N. S. 1201.

(*t*) *Powell v. Double*, Sug. 29.

(*u*) *Tyrconnell v. Ancaster*, 2 Ves. sen. 505.

Annual *rental* does not necessarily imply an annual tenancy at a net rent, but may refer to the aggregate gross rent derived from monthly tenancies, when the landlord pays rates and taxes (*v*), but annual *rent* would, it is presumed, mean *net* rent on a yearly tenancy.

“Ground rent” is understood to be a rent less than the rackrent (*w*). It is the sum paid by the owner or builder of houses for the use of land to build on, and is therefore much under what it lets for when it has been built on (*ww*). When a man buys a ground rent he buys the *reversion* of lands which are built upon, and for which the tenant is paying rent (*www*).

A “*rent-charge*” is, strictly speaking, a rent issuing out of land and charged thereon, with a power of distress (*x*). A rent-charge is distinguished from a rent *service* by the absence of any tenure between grantor and grantee (*y*).

Formerly, if the power of distress were omitted in the deed creating the rent, it was known as a *rent-seck* (*z*); but since the Act 4 Geo. II., c. 28, which confers a statutory power of distress, a rent-seck may be accurately described as a rent-charge.

A “yearly rent,” charged on the rates of a corporation under sect. 11 of the Lands Clauses Act, 1845 (*a*), may be described as a rent-charge in the particulars of sale (*b*).

(*v*) *Edwards v. Sykes & Co.*, 62 L. T. 445.

Contract, (1894) 3 Ch. at p. 301, per Chitty, J.

(*w*) *Stewart v. Alliston*, 1 Mer. 26.

(*y*) *Esdailic v. Stephenson*, 1 Sim. & Stu. 124; Shelford's Real Property Statutes, 9th ed., p. 105.

(*ww*) *Bartlett v. Salmon*, 5 D. C. M. & G. 41.

(*z*) Littleton, s. 218.

(*www*) *Evans v. Robins*, 31 L. J. Ex. 469.

(*a*) 8 Vict. c. 18.
(*b*) *Lord Gerrard and Beecham's Contract*, (1894) 3 Ch. 295.

(*x*) *Lord Gerrard and Beecham's*

A "*fee-farm rent*" is properly a rent-service reserved on a grant in fee (*c*), which, since the Statute of *Quia Emptores* (*d*), can only be created by the Crown. The expression, however, is generally used to describe a perpetual rent-charge in fee-simple (*e*).

The word "farm" will include woodlands forming part of an estate, though not in the occupation of the tenant (*f*).

A "beer-house" is a place where beer is sold to be consumed on the premises (*g*), as opposed to a "beer-shop," which is a place where beer is sold to be consumed off the premises (*h*). Upon the sale of a beer-shop "with the off beer licence attached thereto," there is no obligation on the vendor to procure from the magistrates the temporary authority (under 5 & 6 Vict. c. 44) for the purchaser to carry on the business until the next Special Sessions for transferring licences, and there is no implied warranty by the vendor either that such interim protection will be obtained, or that the licence will be ultimately transferred (*i*).

Notwithstanding that it is the duty of the vendor to describe the estate with accuracy and minuteness in the contract, mere puffing expressions, or statements of value on the part of the vendor, or any statement which is in effect an *expression of his own opinion* will not avoid the contract.

Thus, the statement that a house is "substantial" (*j*),

(*c*) *Vide* Hargrave's Edition of Co. Litt., p. 144.

(*d*) 18 Ed. I, c. 1.

(*e*) *Bradbury v. Wright*, 2 Doug. 624.

(*f*) *Portman v. Mill*, 3 Jur. 356.

(*g*) *Pease v. Coals*, 2 Eq. 688.

(*h*) *London & Suburban Land Co.*

v. *Field*, 16 C. D. 645.

(*i*) *Tadcaster Brewery Co. v. Wilson*, (1897) 1 Ch. 705.

(*j*) *Johnson v. Smart*, 2 Giff. 151.

or is "well built" (*k*), or is a "residence for a family of distinction" (*l*), are merely commendatory statements which do not amount to a misdescription. So, too, a purchaser was held to his contract where the property, which was really worth about £200 a year, was described as of the "estimated value of £400" (*m*).

The expression *eligible* is the ordinary auctioneer's expression, and no importance need be attached to it (*n*).

Frequently the particulars of sale are accompanied by a plan, which will control any inaccuracy or ambiguity in the description of the property (*o*).

SECTION 3.

As to Timber, Growing Crops, and Fixtures.

If the contract does not state that the timber or other trees on the estate are to be paid for separately, they will be included in the contract (*p*). If, however, they are to be paid for by the purchaser, it should be accurately stated for what trees he has to pay; and if it be merely stipulated that timber is to be paid for, the purchaser will have to pay for trees not strictly timber, if considered so according to the custom of the country (*q*). Wood is not

(*k*) *Kennard v. Ashman*, 10 T. L. R. 214, and cf. *Green v. Symons*, 18 T. L. R., 301.

(*l*) *Majennis v. Fallon*, 2 Moll. 587.

(*m*) *In re Hurlburt and Clayton's Contract*, 57 L. J. Ch. 421.

(*n*) *Hope v. Walter*, (1900) 1 Ch. 253.

(*o*) *Nene Valley Drainage Commissioners v. Dunkley*, 4 C. D. 1.

(*p*) *Higginson v. Clowes*, 15 Ves. 516.

(*q*) *Duke of Chandos v. Talbot*, 2 P. Wms. 606.

timber until of twenty years' growth (*r*), and the term timber includes oak, elm and ash, and by local custom, birch, beech and other trees (*s*); and the expression timber and timberlike trees has been held to include sound pollards (*t*).

Where timber upon a copyhold estate, or upon an estate part freehold and part copyhold, is to be paid for separately, it should be borne in mind that if the contract is sufficiently explicit upon the point, the timber upon the copyhold portion of the property will be included in the valuation, even though the copyhold portion cannot be distinguished from the freehold, and the purchaser will be compelled to take it subject to the right of the lord and custom of the manor. But if the contract for the purchase of the timber be separate from that of the estate, the purchaser will be entitled to such possession of it as will entitle him to fell and remove it (*u*).

If no mention is made as to separate payment for common fixtures, they will be included in the contract, unless the contrary may be gathered from the context (*v*).

If the property be in hand, and nothing be said in the contract as to growing crops thereon, they will belong to the purchaser from the day fixed for completion (*w*).

(*r*) *Foster v. Leonard*, Cro. Eliz.

1.

(*s*) *Duke of Chandos v. Talbot*, 2 P. Wms. 606; *Aubrey v. Fisher*, 10 East, 446; *Dashwood v. Mag-niac*, (1891) 3 Ch. 306.

(*t*) *Rabbell v. Raikes*, Woodfall, L. & T. 490; *Channon v. Patch*,

5 B. & C. 893.

(*u*) *Crosse v. Lawrence*, 9 Hare, 462.

(*v*) *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76; *Manning v. Bailey*, 2 Exch. 45.

(*w*) *Dart*, V. & P. 285.

SECTION 4.

Duty of the Purchaser.

The purchaser is *not* bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold, *e.g.*, the existence of a mine under the property (*x*); and no deceit can be implied from the mere silence of the purchase (*y*). “Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other, cannot be a ground for rescission or a defence to specific performance” (*z*). But a single word, or even a gesture, from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for specific performance of the agreement (*a*).

So *a fortiori* would a contrivance on the part of the purchaser who is better informed than the vendor of the real value of the property to be sold, to hurry the vendor into an agreement without giving him the opportunity of being fully informed of its real value (*b*).

(*x*) See *Turner v. Harvey. Jacobs*, 178, and see 2 Bro. C. C. 420.

(*y*) *Coaks v. Boswell*, 11 A. C. 235-6.

(*z*) *Turner v. Green*, (1895) 2 Ch. 205.

(*a*) *Turner v. Harvey. Jacobs*, 178 : *Walters v. Morgan*, 3 De. G. F. & J. 724 ; *Davis v. Ohrly*, 14, T. L. R. 260.

(*b*) *Walters v. Morgan*, 3 De. B. F. & J., 724.

CHAPTER IV.

CONTRACTS BY AGENTS.

SECTION 1.

Authority of the Agent.

Appointment.—We have seen that the requirements of the Statute of Frauds are satisfied if the contract is signed by the party to be charged or some other person thereunto by him lawfully authorised.

The person authorised for this purpose may be appointed by parol, (*a*) and if the agent is acting within the scope of his authority in signing a memorandum which complies with the Statute, it is not necessary to prove that he was expressly authorised to sign it *as a record of the contract* (*b*). An agent cannot, however, bind the principals further than the authority given him will extend.

Scope of Authority.—Thus it is not within the scope of a solicitor's business to act as agent for the sale of his client's property, and consequently a memorandum signed by a solicitor does not bind his client in the absence of

(*a*) *Emmerson v. Healis*, 2 Taunt. 47; Fry on Specific Performance, p. 248. (*b*) *Griffith's Cycle Co. v. Humber & Co.*, (1899) 2 Q. B. 414.

evidence of express authority (*c*). Again where instructions are given to an estate agent to "find a purchaser" of property, he is not authorised to sign a contract on behalf of the vendor (*d*). So, too, where an agent is authorised by the vendor to receive applications to "treat and view" (*e*), or is employed "in and about the purchase" of certain property (*f*), he can only enter into negotiations and receive proposals, and cannot make a binding contract. But where an estate agent was authorised "to sell" certain houses, it was held that this gave him authority to sign a contract on behalf of his principal (*g*).

Auctioneer.—In the case of sales by auction, the auctioneer is the agent both of the vendor and the purchaser, and has authority to sign the contract on behalf of the highest bidder (*h*). The auctioneer's clerk, however, has no authority by the general custom (*i*), although there may be special circumstances to show that he had such authority (*j*). Moreover, the auctioneer's memorandum, in order to bind the purchaser, must be a contemporary memorandum, *i.e.*, "one made at the time and as part of the transaction of sale" (*k*).

(*c*) *Smith v. Webster*, 3 C. D. 49.

2 Ch. 267.

(*d*) *Hamer v. Sharp*, 19 Eq. 113; *Chadburn v. Moore*, 61 L. J. Ch. 674.

(*h*) *Pierce v. Corf*, L. R. 9 Q. B. 210.

(*e*) *Godwin v. Brind*, L. R. 5 C. P. 299.

(*i*) *Bell v. Balls*, (1897) 1 Ch. 663.

(*f*) *Vale of Neath Colliery v. Furness*, 45 L. J. Ch. 276.

(*j*) *Bird v. Bolter*, 4 B. & Ad. 443; *Sims v. Landray*, (1894) 2 Ch. 318.

(*g*) *Rosenbaum v. Belson*, (1900)

(*k*) *Bell v. Balls*, (1897) 1 Ch. at p. 672.

SECTION 2.

Contracts by Unauthorised Agents.

Warranty of Authority.—If a person professing to act as agent enters into a contract without the authority of his principal, the other contracting party can sue the agent upon his warranty of authority (*l*).

Ratification.—A contract entered into by an agent who is not authorised to contract, may be subsequently ratified by the principal, and the maxim applies *omnis habitio rati retrotrahitur et mandato priori equiparatur* (*m*). Thus, where an offer is accepted by an unauthorised agent, and such acceptance is subsequently ratified, a revocation of the offer which is made after the date of acceptance, but prior to the ratification, is inoperative (*n*). The rule as to ratification is, of course, subject to some exceptions, and does not apply to the case of an option of purchase where there is a time limited within which the option must be exercised (*o*).

SECTION 3.

Misrepresentation by Agents.

A contract for the sale of land may be vitiated by misrepresentations made by the agent, although such

(*l*) *Collen v. Wright*, 8 E. & B., 647. If the authority of the agent is denied, he can be made co-defendant in the action under an alternative claim, see *Bennetts & Co. v. M'Illraith & Co.*, (1896) 2 Q. B. 464.

(*m*) This maxim applies even

where the unauthorised agent does not professedly contract as agent, *Durant & Co. v. Roberts & Co.*, (1900) 1 Q. B. 629.

(*n*) *Bolton Partners v. Lambert*, 41 C. D. 295.

(*o*) *Dibbins v. Dibbins*, (1896) 2 Ch. 348.

misrepresentations are made without the knowledge or approval of the principal. Thus an agent employed to find a purchaser, has implied authority to describe the property and represent its value (*p*), and the nature of restrictive covenants affecting its user (*q*), and if the agent makes a misrepresentation of fact, the principal cannot enforce the contract.

Again, if the agent of *B*. expressly states that *B*. is not his principal, this is a misrepresentation which will prevent *B*. from enforcing the contract (*r*).

SECTION 4.

Agent's Commission.

Before concluding the subject of contracts for the sale of land entered into by agents, it may be convenient to say a few words about the *commission* of the vendor's agent. As a general rule the agent earns his commission so soon as a *binding contract* has been entered into, and notwithstanding the fact that the contract is subsequently rescinded by mutual agreement between vendor and purchaser (*s*). Moreover, the agent is entitled to his commission if the sale is brought about in consequence of his introduction, although the ultimate bargain is not actually made by him (*t*).

(*p*) *Mullens v. Miller*, 22 C. D. 194.

12 (where the vendor returned the deposit).

(*q*) *Wauton v. Coppard*, (1899) 1 Ch. 92.

(*t*) *Green v. Barlett*, 14 C. B. N. S. 681, *ex parte Durrant*, 5 Mor. 37.

(*r*) *Archer v. Stone*, 78 L. T. 34.

(*s*) *Horford v. Wilson*, 1 Taunt,

But if through no default of the vendor a final agreement has not been arrived at between the parties, the agent cannot claim his commission (*u*), and it is presumed that the same result would follow if, through the agent's negligence, the contract, although final, is not evidenced in writing in accordance with the Statute of Frauds so as to be enforceable against the purchaser (*v*).

If the vendor pays a secret commission to the agent of the purchaser, the purchaser may deduct the amount of such commission from the purchase money without rescinding the contract (*w*).

(*u*) *Grogan v. Smith*, 7 T. L. R. 132, cf. *Passingham v. King*, 14

T. L. R. 39.

(*v*) Cf. *Denev v. Daverell*, 3 Camp 451 (there the action was on a *quantum meruit*, and not on a

special contract for a stipulated sum).

(*w*) *Grant v. Gold Exploration and Developmment Syndicate*, (1900) 1 Q. B. 233.

PART II.

CAPACITY OF VENDOR AND PURCHASER.

CHAPTER V.

PARTIES UNDER DISABILITY.

SECTION 1.

Infants.

THE proposed vendor and purchaser should be capable of selling and purchasing real estate, and not only so, but should be in such a position that their contracts may not be avoided by reason of any disability such as infancy, coverture, lunacy, or the like.

Disability of Infant.—An infant cannot enter into a binding contract for the sale or purchase of lands, nor can he sue for the specific performance of such a contract during his infancy (*a*); but on attaining his majority he might formerly have avoided or confirmed it, his representatives having the like privilege should he die under age (*b*). It is now, however, provided by the Infants' Relief Act, 1874 (*c*), that no action shall be

(*a*) *Flight v. Bolland*, 4 Rus. 298. Abr. 393.

(*b*) *Claydon v. Ashdown*, 9 Vin. (*c*) 37 & 38 Vict. c. 62.

brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*d*). But by the custom of gavelkind, a tenant of an estate of freehold may, at the age of fifteen, dispose of his estate by feoffment (*e*).

An infant cannot take advantage of his own fraud (*f*) ; and if an infant contracts for purchase of an estate and pays a deposit, and on attaining his majority refuses to complete the purchase, he cannot recover the deposit unless fraud was practised in procuring it from him (*g*).

An infant cannot exercise a power over *real estate* (whether coupled with an interest or simply collateral), unless there is an indication that the power may be exercised during minority (*h*).

Sales by Infant under Statutory Powers.—An infant is enabled by certain statutes to sell land for special purposes, such as religion, charity, instruction, literature, science, and the fine arts, or works of a public nature (*i*).

The sale of land belonging to an infant may now be made on his behalf under the provisions of the Settled Estates Act, 1877 (*j*), and Settled Land Act, 1882 (*k*).

(*d*) 37 & 38 Vict. c. 62, s. 2.

(*e*) 2 Bl. 84 ; but cf. *In re Maskell and Goldfinch's Contract*, (1895) 2 Ch. 525.

(*f*) *Overton v. Bannister*, 3 Hare, 503 ; *Wright v. Snow*, 2 De G. & Sm. 321.

(*g*) *Ex parte Taylor*, 8 D. M. & G. 257. See also Sugd. V. & P. 209.

(*h*) *Hearle v. Greenbank*, 3 Atk. 695 ; *In re D'Angibeau*, 15 C. D. 228.

(*i*) See Dart, V. & P. p. 3.

(*j*) 40 & 41 Vict. c. 18.

(*k*) 45 & 46 Vict. c. 38.

By sect. 16 of the Settled Estates Act, the Court is empowered to authorise a sale of the whole or any part of the settled estates, or any timber (not being ornamental timber) growing on any settled estates subject to any restrictions contained in the Act.

By sect. 41 of the Conveyancing Act, 1881 (*l*), it is enacted that "where a person in his own right seised of or entitled to land for an estate in fee simple or for any leasehold interest at a rent *is an infant*, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.. The words "seised of or entitled to land for an estate in fee simple," include the case of an infant who is only *contingently entitled* (*m*). Thus, where an infant is entitled to land in the event of his attaining twenty-seven, and it is desired to sell the estate on his behalf, the proper course is for the infant to petition the Court by his next friend; for it has been held that the powers given by the Settled Land Act, 1882, cannot be exercised where an infant is only contingently entitled unless the case falls within sect. 63 of that statute (*n*). In every other case, the sale of an infant's land can be made more cheaply and expeditiously under the provisions of the Settled Land Act, 1882. The power of sale conferred on tenants for life by that act (*o*) may be exercised on behalf of infants in the following cases:—where an infant is in his own right seised of or entitled *in possession* to land (*p*); secondly, where an infant is tenant for life, or would,

(*l*) 44 & 45 Vict. c. 41.

(*n*) *Re Horne*, 39 C. D. 84.

(*m*) *Liddell v. Liddell*, 52 L. J.

(*o*) 45 & 46 Vict. c. 38. s. 3.

Ch. 207; *In re Sparrow's Estate*,

(*p*) *Ib.* s. 59.

(1892) 1 Ch. 412.

if he were of full age, be a tenant for life (*q*) ; and thirdly, where an infant has the powers of a tenant for life (*r*), or would, if he were of full age, have those powers.) The persons to exercise the power of sale on behalf of an infant are either the trustees of the settlement or, if there are none, then "such persons and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular case, orders" (*s*).

SECTION 2.

Married Women.

Married women, with regard to their capacity as vendors of real property, may conveniently be treated under two heads, viz. :—

- I. Women married before the 1st January, 1883 (when the Married Women's Property Act, 1882, came into operation), and whose title to property, whether vested or contingent, and whether in possession, reversion, or remainder, accrued prior to that date.
- II. Women married since the 1st January, 1883, or who, though married before the 1st January, 1883, did not acquire a title until after that date (*t*).

(*q*) 45 & 46 Vict. c. 38, s. 60.

holme, 7th ed. p. 417.

(*r*) *Ib.* s. 58.

(*t*) 45 & 46 Vict. c. 75, s. 5.

(*s*) 45 & 46 Vict. c. 38, s. 60.

And see *Reid v. Reid*, 31 C. D.

For form of summons, see Wolsten-

402.

Class 1.—Women Married before 1st January 1883.

In dealing with married women who fall within Class 1, it is necessary to consider the doctrine of Separate Use originally established by Courts of Equity.

The effect of this doctrine was to put a married woman in almost every respect into the position of a *feme sole* with regard to property limited to her separate use by deed or will (*u*). Superimposed on this doctrine of Separate Use was a further doctrine of equity, devised by Lord Thurlow, at the end of the 18th century, which enabled a testator or grantor to impose a fetter on the power of disposition *inter vivos* conferred by the separate use (*v*). This fetter is known as Restraint on Anticipation.

- It is therefore necessary to subdivide Class 1 into
- (1.) Married women whose property is *not* limited to their separate use.
 - (2.) Married women whose property is limited to their separate use.
 - (3.) Married women whose property is limited to their separate use, but with restraint on anticipation.

Where no Separate Use.—Real estate of freehold tenure, which is not held by a married woman to her separate use, can only be disposed of by her with the concurrence of her husband and by a deed acknowledged under the Fines

(*u*) See *Taylor v. Meads*, 4 De. G., J. & S., 604.

(*v*) Cf. *Stogdon v. Lee*, (1891) 1 Q. B. 661.

and Recoveries Act (*w*). The Court (*x*) has power under sect. 91 of that Act to dispense with the concurrence of the husband in certain cases. The Act makes elaborate provisions (*y*) as to the manner in which an acknowledgement is to be made and before whom it is to be taken.

The Conveyancing Act, 1882, renders one commissioner only requisite for taking the acknowledgment, and provides that such acknowledgment shall not be impeachable by reason only that the judge or commissioner taking the same is interested (*z*).

A married woman's *legal* estate in copyholds cannot be surrendered without her husband's consent and without her separate examination either by the steward or, under special custom, by two stewards (*a*). The *equitable* interest of a married woman in copyholds can be assigned by her by deed acknowledged with her husband's concurrence (*b*), or may be surrendered in the same manner as a legal estate (*c*). It has been held, however, that a married woman who is tenant on the rolls can declare herself a trustee by deed acknowledged under sect. 77 of the Fines and Recoveries Act, so as to effectually bind the estate against her heir (*d*).

A husband may dispose of a term of years belonging to his wife, which is not subject to the Married Women's Property Act, 1882, or settled to her separate use, either

(*w*) 3 & 4 Will. 4, c. 74, s. 77. 89.

See also Settled Land Act, 1882, s. 61, sub-s. 3.

(*x*) Either Queen's Bench or Chancery Division: *In re Ellen Giles*, (1894) W. N. 73.

(*y*) 3 & 4 Will. 4, c. 74, ss. 79—

(*z*) 45 & 46 Vict. c. 39, s. 7.

(*a*) Elton on Copyholds, p. 56.

(*b*) 3 & 4 Will. 4, c. 74, s. 77.

(*c*) *Ib.* s. 90.

(*d*) *Carter v. Carter*, (1896) 1 Ch.

absolutely or by way of mortgage (*e*) ; but, if he does not exercise such power, it will pass upon the death of either husband or wife to the survivor without the necessity of taking out administration (*f*). The power of the husband extends to reversionary and contingent interests (*g*), unless the interest is such that it cannot vest in the wife during coverture in possession (*h*). If the interest is equitable, the wife must concur in and acknowledge the deed disposing thereof, in order to bar her equity to a settlement (*i*).

Separate Use.—By the separate use *a feme covert* is freed to a great extent from the disability of coverture, and can convey any equitable interest as if she were unmarried. When, however, the fee simple in land is vested in a married woman for her separate use, she can only convey the *legal estate* by deed acknowledged with the concurrence of her husband (*j*), unless she has *power* to appoint the fee (*k*). It would seem, moreover, that if a married woman is tenant in tail, even in the case of an *equitable* estate tail limited to her separate use, she can only bar the entail by deed acknowledged, and that her husband's concurrence is necessary (*l*). A reversionary

(*e*) *Hill v. Edmonds*, 5 De G. & S. 603, 607.

(*f*) *Re Bellamy*, 25 C. D. 620. This right of survivorship also exists where leaseholds belong to the wife's separate estate, provided that she die intestate : *Surman v. Wharton*, (1891) 1 Q. B. 491.

(*g*) *Donne v. Hart*, 2 R. & M. 360.

(*h*) *Duberley v. Day*, 16 Beav. 33.

(*i*) *Hanson v. Keating*, 4 Hare, 1.

(*j*) *Lechmere v. Brotheridge*, 32 Beav. 368.

(*k*) A power of appointment could always be exercised by a married woman without the concurrence of her husband, and such a power may co-exist with the fee. See *Farwell on Powers*, pp. 116 & 38.

(*l*) *Cooper v. Macdonald*, 7 C. D. A. 295 ; 3 & 4 Will. 4, c. 74. s. 40.

interest may be settled to the separate use of a married woman (*m*) ; and although doubts have been expressed whether a *contingent* reversionary interest can be settled to a separate use, the better opinion is that it can be so limited. Freehold and copyhold property which descends to a woman married after the 9th August 1870, as heiress of an intestate is held by her to her separate use (*n*) although apparently such separate use is limited to her life (*o*).

Restraint on Anticipation.—A restraint on anticipation could only be imposed on property which was limited to a married woman for her separate use (*p*), but no particular form of words was necessary, provided that the intention was sufficiently clear. The restraint, unless expressly confined to a particular coverture, will operate on all the covertures of a woman, but she can destroy it while she is *discovert* (*q*). A clause restraining anticipation may apply to a gift of capital or the fee simple of real estate, as well as to a gift of income (*r*). A married woman can bar an estate tail, although she is restrained from anticipation (*s*). Where a married woman is a tenant for life under the Settled Land Acts, and is entitled for her separate use, she can exercise the powers of a tenant for life notwithstanding a restraint on anticipation (*t*).

(*m*) *King v. Lucas*, 23 C. D. 723; *Sturgis v. Corp*, 13 Ves. 190.

(*n*) 38 & 34 Vict. c. 93, s. 8.

(*o*) *Johnson v. Johnson*, 35 C. D. 345.

(*p*) *Stogdon v. Lee*, (1891) 1 Q. B. 661.

(*q*) *Re Gaffee*, 1 Mac. & G. 545.

(*r*) *Re Gray's Settlement*, 34 C. D. 712; *Bates v. Kesterton*, (1896) 1

Ch. 163.

(*s*) *Cooper v. Macdonald*, 7 C. D. 288.

(*t*) Settled Land Act, 1882, s. 61. sub-ss. 2 and 6.

Where, however, there is a separate use with restraint on anticipation affixed to the *fee simple* of property to which a married woman is entitled, she is not a tenant for life for the purposes of the Settled Land Acts; for the estate, by the courtesy which her husband takes in the event of her dying intestate, is by virtue of the general law and not under a settlement (*u*).

If a married woman, restrained from anticipation, and not being a tenant for life, desires to sell her property, an application must be made to the Court by originating summons.

The Court has power under sect. 39 of the Conveyancing Act, 1881, to make an order binding the married woman's property.

Class 2.—Women married after the 1st January 1883, or who though married before the 1st January 1883 did not acquire a title until after that date.

A *feme covert* who comes within the second of the two classes into which we have divided married women, can sell and convey property to which she is *beneficially* entitled in the same manner as if she were a *feme sole*, unless she is restrained from anticipation (*v*). If, however, she holds property as trustee, she can only convey by deed acknowledged with the concurrence of her husband under the Fines and Recoveries Act (*w*), except

(*u*) *Bates v. Kesterton*, (1896) 1 Ch. 159.

(*v*) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 19.

(*w*) *Re Harkness and Allsopp*,

(1896) 2 Ch. 358. This is a very narrow construction, and seems to be "opposed to the intentions of the Legislature, as apparent by the Statute," cf. 6 A. C. at p. 122.

in cases where she is simply a *bare trustee*, i.e., a trustee having no duties to perform, except to convey the property by the direction of the *cestuis que trust* (x). This exception does not apply to land conveyed to a married woman by way of mortgage, and she can deal with the mortgage security as if she were a *feme sole* (y).

The validity of a restraint on anticipation is preserved by the Married Women's Property Act, and such a restraint may now be imposed, although the property is not limited to the separate use of a married woman (z).

By sect. 19 of the Married Women's Property Act, 1882, it is provided that the Act shall not invalidate any settlement or agreement for a settlement, whether made before or after the Act, and whether antenuptial or post-nuptial. A covenant by a married woman to bring in after-acquired property affects property as to which she had merely a *spes successionis* at the time of the covenant (a).

Moreover, a covenant in a settlement by the *husband alone* to bring in the after-acquired property of his wife is binding on personality and chattels real which she subsequently acquires, unless such property is settled to her separate use (b).

Married Women as Purchasers.

Prior to the 5th December, 1893, a contract by a married woman could not be enforced unless *at the time*

(x) Trustee Act, (1898) s. 18.

(a) *In re Johnson*, (1891) 3 Ch. 48.

(y) *Re Brooke and Fremlin's Contract*, (1898) 1 Ch. 647.

(b) *Dawes v. Tredwell*, 18 C. D.

(z) *Re Lumley*, (1896) 2 Ch. 690.

854; *Hancock v. Hancock*, 88 C. D.

78.

it was entered into she was possessed of separate estate which she was not restrained from anticipating, whether created by express limitation or by the provisions of the Married Women's Property Acts (*c.*).

Now, however, by sect. 1 of the Married Women's Property Act, 1893 (*d*), it is enacted that every contract entered into by a married woman (otherwise than as agent) "shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and shall also be enforceable by process of law against all property which she may thereafter, while discovert, be possessed of or entitled to: provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating."

SECTION 3.

Lunatics.

Contracts by Lunatics voidable.—A contract entered into by a lunatic or idiot is voidable, if the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about.

(*c.*) *Palliser v. Gurney*, 19 Q. B. (*d*) 56 & 57 Vict. c. 63.
D, 519.

But if the other party acted *bona fide*, and had no notice of the insanity, he can enforce the contract whether it be executed or executory (*e*) ; and all acts done by a lunatic during a lucid interval are binding (*f*). Upon the same principle it has been held that "dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding" (*g*).

It seems that a *voluntary* conveyance by a lunatic would in any case be voidable (*h*).

Committees of Lunatics.—Prior to 1845, insane persons who were not lunatics so found by inquisition, inasmuch as they had no committees, were absolutely outside the jurisdiction of the Court of Lunacy. Such persons are now provided for by sect. 116 of the Lunacy Act, 1890. This section specifies five classes of lunatics not so found by inquisition, with regard to whom the powers of a committee shall be exercised by such person, in such manner, and with or without security, as the judge may direct (*i*).

The Court has power under the Lunacy Act, 1890 (*j*),

(*e*) *Molton v. Cameroux*, 4 Ex. 17; *Imperial Loan Company v. Stone*, (1892) 1 Q. B. 599. But it seems doubtful whether a Court of Equity would grant specific performance. See *Frost v. Beavan*, 22 L. J., Ch. 688; *Leaver v. Torris*, 43 Sol. J., 778; *Baldwyn v. Smith*, (1900) 1 Ch. 590.

(*f*) *Beverley's Case*, 4 Co. R. 128 b.; *Hall v. Warren*, 9 Ves. 610.

(*g*) *Elliot v. Ince*, 7 D. M. & G. 488; *Price v. Borrington*, 3 M. & G. 498; *Sergeson v. Sealy*, 2 Atk. 412.

(*h*) *Elliot v. Ince*, 7 D. M. & G. 487.

(*i*) 53 & 54 Vict. c. 5, s. 116, sub-s. 1 and 2.

(*j*) *Ib.* s. 120 (a); and see also s. 117.

to authorise the sale of property *belonging* (*k*) to the lunatic by his committee or the person appointed under sect. 116; but this authority will not be given unless there are circumstances which render it desirable that the land should be sold. The proper course is for the committee to enter into a provisional agreement which is presented to the master for approval, and confirmed by the lords justices sitting as judges in lunacy (*l*). The conveyance is settled by the master, and executed by the committee under section 124 of the Act.) Where a lunatic has a power of sale, or a power to consent to a sale, the Court has jurisdiction under sections 120 and 128 of the Act to authorise the committee or person appointed under section 116 to exercise the power or give the necessary consent (*m*). The committee of a lunatic may exercise the powers of a tenant for life under the Settled Land Acts, by virtue of sect. 62 of the Settled Land Act, 1882, under an order of the Court of Lunacy; but this is limited to the case of a lunatic so found by inquisition (*n*).

The Court has jurisdiction to authorise the sale of a lunatic's property in consideration of a perpetual rent-charge (*o*), and may also empower the committee to enter into the ordinary covenants for title (*p*).

(*k*) This does not include property of which the lunatic is tenant for life: *In re Salt*, (1896) 1 Ch. 120.

(*l*) Pope on Lunacy, p. 187.

(*m*) *In re X.*, (1894) 2 Ch. 415.

(*n*) *In re Baggs*, (1894) 2 Ch. 416, n.

(*o*) *In re Ware*, (1892) 1 Ch. 344.

(*p*) *In re Ray*, (1896) 1 Ch. 468.

SECTION 4.

Corporations.

Disability of Corporations.—Corporations cannot hold land unless authorised by Act of Parliament, or licence obtained by them for that purpose (*q*). A company registered under the Joint Stock Companies Acts has power to hold lands (*r*), but no company formed for the purpose of promoting art, science, religion or charity, or any other like object not involving the acquisition of gain by the company or by the individual members thereof, shall, without the sanction of the Board of Trade, hold more than two acres of land; but the Board of Trade may, by licence under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in such quantity, and subject to such conditions, as they think fit (*s*).

Purchases by individuals who are unincorporated must be made by them in their private capacities and individual names. A purchase by *eo nomine* the inhabitants of a place, or the parishioners or churchwardens of a parish, is bad; so is a similar purchase by or grant to the commoners of a waste (*t*). A parson is a corporation sole, and may hold land as such for the use and benefit of the Church, but churchwardens are not a corporation for the purpose of holding land (*u*).

By the custom of London and some other places the parson and the churchwardens are a corporation to pur-

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| (<i>q</i>) Co. Litt. 92 a, 2 b; and see
51 & 52 Vict. c. 42, ss. 1 and 2. | (<i>t</i>) Co. Litt. 3 a.
(<i>u</i>) <i>Att.-Gen. v. Ruper</i> , 2 P. Wms. |
| (<i>r</i>) 25 & 26 Vict. c. 89, s. 18. | 125. |
| (<i>s</i>) <i>Ib.</i> s. 21. | |

chase land (*v*). Land may be held by the churchwardens *jointly* with the overseers of a parish for the purposes of poor relief (*w*), and the ministers, churchwardens, and overseers are a corporation aggregate for the purposes of the School Sites Acts (*x*).

Statutory Powers to hold land.—The following bodies have statutory powers to acquire or purchase land, viz. :—

County councils for the purpose of any of their powers and duties (*y*), and for the purposes of the Small Holdings Act, 1892 (*z*).

Urban district councils and *county boroughs* acting as urban sanitary authorities for the purposes of the Public Health Acts (*a*).

Rural district councils for the purposes of their powers and duties as rural sanitary authorities and highway boards (*b*).

London Borough Councils, formerly metropolitan vestries and district boards, for the purposes of the Metropolitan Management Acts (*c*).

Municipal corporations (up to five acres) for the purpose of municipal buildings, or with the sanction of the Local Government Board for other purposes approved by the Board (*d*).

(*v*) *Warner's case*, Cro. Jac. 532.

(*w*) 59 Geo. III., c. 12, s. 17.

(*x*) 12 & 13 Vict. c. 49; and 14 Vict. c. 24.

(*y*) Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 65 and 79.

(*z*) 55 & 56 Vict. c. 31.

(*a*) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 21, sub-s. 1; Public Health Act, 1875, 38 & 39

Vict. c. 55, ss. 7 and 175.

(*b*) 56 & 57 Vict. c. 73, s. 24, sub-s. 7; s. 25, sub-s. 1; and see also 38 & 39 Vict. c. 55, s. 175; 25 & 26 Vict. c. 61, s. 9.

(*c*) 18 & 19 Vict. c. 120, s. 42; 62 & 63 Vict. c. 14, s. 34.

(*d*) Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 105 and 107.

Parish councils for the purpose of public offices, recreation grounds, and public walks (*e*).

School boards for the purpose of providing sufficient school accommodation for their district (*f*) ; and *guardians of the poor* subject to the sanction of the Local Government Board for the purpose of workhouse accommodation (*g*).

The council of a county or borough may purchase land at the request of a volunteer corps, and hold it on behalf of a volunteer corps for military purposes (*h*) ; and any corporate body may acquire and hold land for the purposes of the Technical and Industrial Institutions Act (*i*).

In the case of a *sale* of land by a school board, the consent of the Education Department is necessary (*j*).

The sanction of the Local Government Board must be obtained to a sale of land by a county council (*k*), municipal corporation (*l*), London Borough Council (*ll*), parish council (*m*) or poor law guardians (*n*).

London Borough Councils are absolutely prohibited from alienating recreation grounds and other open spaces dedicated to the use of the public (*nn*).

Ecclesiastical Corporations.—*Ecclesiastical Corporations*, with certain exceptions, have power to sell their estates

(*e*) 56 & 57 Vict. c. 73, s. 3,
sub-s. 9 ; s. 8, sub-s. 1.

(*j*) 33 & 34 Vict. c. 75, s. 22.

(*k*) 51 & 52 Vict. c. 41, s. 64.

(*f*) Education Act, 1870 (33 & 34 Vict. c. 75), ss. 19, 20 and 21 ; and s. 30, sub-s. 1.

(*l*) 45 & 46 Vict. c. 50, s. 108 ; and see *Davis v. Corporation of Leicester*, (1894) 2 Ch. 208.

(*g*) 5 & 6 Will. 4, c. 69, ss. 1, 3, & 6.

(*ll*) 62 & 63 Vict. c. 14, s. 6, sub-s. 5.

(*h*) Military Lands Act (55 & 56 Vict. c. 43), s. 1, sub-s. 3. As to the construction of this Act, see *Hill v. Haire, Ir. R.*, (1899) 1 Ch. 87.

(*m*) 56 & 57 Vict. c. 73, s. 8, sub-s. 2.

(*i*) 55 & 56 Vict. c. 29, s. 10, sub-s. 2.

(*n*) 5 & 6 Will. 4, c. 69, ss. 3 and 6 ; and cf. 56 & 57 Vict. c. 73, s. 6, sub-s. 1 (d).

(*nn*) 62 & 63 Vict. c. 14, s. 32.

or endowments with the consent of the patron of the benefice, and with the consent of the *Ecclesiastical Commissioners*, to be testified by deed under their common seal, and after three months' notice to the bishop of the diocese (o). Ecclesiastical corporations, with the exception of colleges and hospitals, have also power, with the approval of the *Church Estate Commissioners*, to sell the reversions in church lands to their lessees (p).

Sales of glebe lands may now be made, with the approval of the Board of Agriculture, under the Glebe Lands Act, 1888 (q).

Contracts by Corporations.—A contract by a corporation for the sale or purchase of land must be under the seal of the corporation or signed on behalf of the corporation by an agent authorised under seal. But a contract not under seal may subsequently be ratified by the corporation under seal, unless the other party has previously repudiated the contract (r).

Application of the Doctrine of Part Performance to Contracts by Corporations.

The doctrine of part performance has been applied to contracts by corporations aggregate, which, as we have seen, can only bind themselves by contract under seal or made by an agent appointed under seal.

(o) 21 & 22 Vict. c. 57.

(p) 14 & 15 Vict. c. 104, ss. 1 and 11; 24 & 25 Vict. c. 105, s. 3; 25 & 26 Vict. c. 52, s. 2.

(q) 51 & 52 Vict. c. 20. For rules under this Act, see W. N., 1897, p. 117.

(r) 1 Blackst. Com. 475; *Mayor*

of Oxford v. Crow, (1898) 3 Ch. 535; *Mayor of Kidderminster v. Hardwick*, L. R., 9 Ex. at p. 22; see also Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37; and Companies Clauses Act, 1845 (8 Vict. c. 16), s. 97.

A distinction, however, must be drawn between the case of a corporation which, by common law, must contract under seal, and the case of a corporation acting as urban sanitary authority, which is subject to the express statutory restrictions imposed by the Public Health Act, 1875, where the value or amount exceeds £50 (*s*).

Where the Doctrine applies.—In the former case it is probable that the doctrine of part performance applies, although this was doubted by Lord Justice Cotton in *Hunt v. Wimbledon Local Board* (*t*).

The earliest decision on this subject is that of Lord Cottenham in *London and Birmingham Rail. Co. v. Winter* (*u*). In that case the company made a contract for the purchase of land by an agent who had not been appointed under seal. The company having entered into possession and made a railway over the land, it was held that they could enforce specific performance. *Wilson v. The West Hartlepool Rail. Co.* (*v*), decided twenty-five years later, is the precisely converse case. There the agent of the company agreed to sell land to the plaintiff, who was let into possession of the property. The Court enforced specific performance at the suit of the purchaser, and Lord Justice Turner in his judgment (*w*) said: "I cannot hold that acts which, if done by an individual, would

(*s*) 38 & 39 Vict. c. 55, s. 174; see *Young & Co. v. Mayor, &c. of Leamington Spa*, 8 A. C. 523.

(*t*) 4 C. P. D. 61; see also Dart on *Vendors & Purchasers*, pp. 273, 274. It must be admitted that the cases on the subject can be to a large extent explained on the prin-

ciple of *acquiescence*, as laid down in *Savage v. Foster*, White & Tudor's L. C., Vol. II.

(*u*) *Craig & Philips*, 57; see also *Laird v. Birkenhead Rail. Co.*, 29 L. J., Ch. 218.

(*v*) 2 De G., J. & S. 475.

(*w*) at p. 498.

amount to fraud, ought not to be so considered if done by a company; nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement."

In *Crook v. Corporation of Seaford* (*x*) the corporation agreed to lease to the plaintiff a part of the Seaford beach for the purpose of building a terrace. The resolution was regularly entered in the books of the corporation, but there was no contract under seal. After the plaintiff had been in possession for several years, and had expended large sums of money in building a terrace and sea-wall, the corporation tried to eject him, but the Court of Appeal compelled them to perform the contract by granting a lease for 300 years (*y*).

These decisions were approved by Lord Lindley, when a judge of first instance, in *Hunt v. Wimbledon Local Board* (*z*), and by the Privy Council in *Melbourne Banking Corporation v. Brougham* (*a*). The principle seems also to have been accepted by Kelly, C. B., in *Mayor of Kidderminster v. Hardwick* (*b*), and in two recent decisions by judges of the Chancery Division (*c*).

Where Doctrine is inapplicable.—On the other hand, where a corporation is acting as urban sanitary authority, it is established by the decision of the Court of Appeal, in

(*x*) 6 Ch. 51.

(*b*) L. R., 9 Ex. at pp. 19 and 20.

(*y*) See also *Wood v. Tate*, 2 B. & P. N. R. 247.

(*c*) Romer, J., in *Mayor of Oxford v. Crow*, (1893) 3 Ch. at p. 539;

(*z*) 3 C. P. D. at p. 214.

North, J., in *Davis v. Corporation of Leicester*, (1894) 2 Ch. at p. 217.

(*a*) 4 A. C. 169.

Hunt v. Wimbledon Board (*d*), and of the House of Lords, in *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa* (*e*), that a contract not under seal cannot be enforced, even although it has been fully performed by the party seeking to enforce it. These, however, were cases of work done for, and accepted by, a corporation ; and the doctrine of part performance has been confined almost exclusively to contracts for an interest in land (*f*).

SECTION 5.

Trustees of Charity Lands.

The charity commissioners have power under the Charitable Trusts Act, 1853, to authorise the sale of land belonging to a charity upon the application of the trustees or persons acting in the administration thereof (*g*), and may also authorise the sale or redemption of rent-charges (*h*).

Sales authorised by the charity commissioners have the same validity as if they had been directed by the express terms of the trust affecting the charity (*i*). Even when the deed creating the trust expressly conferred a power of sale, such power cannot be exercised by the trustees without the sanction of the charity commissioners (*j*).

(*d*) 4 C. P. D. 48.

681.

(*e*) 8 A. C. 517.

(*g*) 16 & 17 Vict. c. 137, s. 24.

(*f*) See *Britain v. Rossiter*, 11 Q. B. D. 128; cf., however, *Hammersley v. De Biel*, 12 Cl. & F. 64, n.;

(*h*) *Ib.* s. 25.

Lawrence v. Tierney, 1 Mac. & G. 572; *Taylor v. Beech*, 1 Ves. sen.

(*i*) *Ib.* s. 26.

297; *McManus v. Cooke*, 35 C. D.

(*j*) *In re Mason's Orphanage and London & North-Western Rail. Co.*, (1896) 1 Ch. 596.

For by sect. 29 of the Charitable Trusts Act, 1855 (*k*), it is enacted that it shall not be lawful for the trustees of a charity to sell “otherwise than with the express authority of parliament, or of a Court or judge of competent jurisdiction, or according to *a scheme legally established*, or with the approval of the board” (*i.e.*, the charity commissioners).

A scheme legally established means a scheme either sanctioned by the Court of Chancery, or sanctioned by those other Courts which under the Charitable Trusts Act, 1853, could sanction schemes (*l*).

SECTION 6.

Bankrupts.

Vesting of Bankrupt's Property.—Immediately on a debtor being adjudged bankrupt, his property vests in the trustee in bankruptcy under sect. 54 of the Bankruptcy Act, 1883 (*m*), and by sect. 43 of that Act, the title of the trustee *relates back* to the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within *three months* next preceding the date of the presentation of the bankruptcy petition. A conveyance by the bankrupt for valuable consideration made *before the date of the receiving order* to a person who has no notice of

(*k*) 18 & 19 Vict. c. 124. This does not apply to charities wholly maintained by voluntary contributions, or to charity lands purchased with money arising from voluntary

subscriptions. *In re Clergy Orphan Corporation*, (1894) 3 Ch. 145.

(*l*) *In re Mason's Orphanage* (1896) 1 Ch. at p. 601.

(*m*) 46 & 47 Vict. c. 52.

any available act of bankruptcy, is, however, protected by sect. 49, even although it be in itself an act of bankruptcy (*n*). It follows from the above that a bankrupt is unable to convey property to which he was entitled at the time of the adjudication, or which he has subsequently acquired prior to his discharge. The rule in *Cohen v. Mitchell* (*o*), that, until the trustee intervenes, all transactions by the bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his *after-acquired* property are valid, does not apply to the sale by a bankrupt of real estate which he has acquired since his bankruptcy (*p*). It has, however, been held by the late Lord Justice Chitty that the rule in *Cohen v. Mitchell* does apply to the sale of leaseholds, even although the purchaser has full notice of the bankruptcy (*q*).

Sale by Trustee.—The trustee in bankruptcy may sell all or any part of the property of the bankrupt, by public auction or private contract, with power to transfer the whole thereof to any person or company (*r*).

When, instead of an order of adjudication, a composition or scheme of arrangement is entered into with the approval of the Court under the Bankruptcy Act, 1890 (*s*) and a trustee is appointed to manage the debtor's property (*t*)

(*n*) *Shears v. Goddard*, (1896) 1 Q. B. 405.

(*o*) 25 Q. B. D. 262.

(*p*) *New Land Development Association and Gray*, (1892) 2 Ch. 138; and cf. *Re Calcott and Elvin*, (1898) 2 Ch. 460.

(*q*) *Re Clayton and Barclay's Con-*

tract, (1895) 2 Ch. 212; *sed quære*, cf. judgment of Lord Cottenham in *Meux v. Smith*, 11 Sim at p. 428.

(*r*) 46 & 47 Vict. c. 52, s. 56.

(*s*) 53 & 54 Vict. c. 71, s. 3.

(*t*) *Ib.* sub-s. 16.

such property vests in the trustee, and he has the same powers as a trustee in bankruptcy (*u*).

Neither the trustee in bankruptcy nor any member of the committee of inspection can purchase the bankrupt's property (*v*); but the partner of a member of the committee of inspection can purchase for his own benefit (*w*).

SECTION 7.

Convicts.

Since the Forfeiture Act, 1870 (*x*), the property of a convict is no longer forfeited, but he is incapable of entering into a contract or alienating his property (*y*). The Act provides for the appointment of an administrator with power to sell and convey the convict's property (*z*).

(*u*) 53 & 54 Vict. c. 71, s. 3,
sub-s. 17.

(*v*) Bankruptcy Rules, 1886 and
1890, r. 316.

(*w*) *Re Gallard*, W. N. 1897, 38.
(*x*) 33 & 34 Vict. c. 23.

(*y*) *Ib.* s. 8.
(*z*) *Ib.* ss. 9 and 12.

CHAPTER VI.

SALES BY FIDUCIARY VENDORS AND
MORTGAGEES.

SECTION 1.

By whom Express Trusts or Powers of Sale may be executed.
PERSONS acting in a fiduciary capacity, such as trustees for sale, persons selling under statutory or other powers, executors and administrators, trustees in bankruptcy and other persons acting under trusts or for the benefit of others, derive the powers and authorities exercised by them under the deed, will, or other document creating the trust or power, or by statutory enactment; and during the present reign the powers of such persons have been materially facilitated and augmented by various Acts of Parliament, to which reference will be hereafter made. And, first, as to trusts and powers created by deed or will.

Trusts for and powers of sale usually declare by whom they are to be exercised, the time of such exercise, and in what manner they are to be carried into execution, and how the proceeds of sale are to be disposed of.

When a power or trust is given to or vested in trustees

jointly by any instrument coming into operation after the 31st December 1881, the same may be exercised or performed by the survivor or survivors of them for the time being, unless the contrary is expressed in the instrument (*a*).

In the case of Trusts.—If an estate is vested in A. and B. and *their heirs* on trust to sell, the legal personal representatives of the survivor of A. and B. (or, in the case of copyholds, his heir) are trustees under the will, take the estate on trust for sale, and can sell it (*b*). It appears to be immaterial, at any rate in the case of freeholds, whether the trust is simply to sell or that “they, the said trustees or the survivor of them, or the heirs and assigns of such survivor, shall sell.” In the case of copyholds, however, where there is no mention of *assigns* in the instrument creating the trust, and the last surviving trustee devises the trust estate, it is open to doubt whether the devisees can carry out the trust for sale (*c*). Moreover, both as to freehold and copyhold estate, if the original devise or conveyance was made to A. and B. *simpliciter*, and not to A. and B. and their heirs, it is probable that the real or personal representatives of the survivor could not give a good title (*d*).

In the case of Powers.—In considering who can exercise a *power of sale*, it is important to observe the distinction between a bare or naked power, and a power given

(*a*) 56 & 57 Vict. c. 53, s. 22.

(*c*) *Cooke v. Crawford*, 13 Sim. 91.

(*b*) *Re Morton and Hallett*, 15 C.D. 143; 44 & 45 Vict. c. 41, s. 30.

(*d*) *Mortimer v. Ireland*, 11 Jur.

to trustees who take the legal estate. A bare or naked power is where the settlor has disposed of his property in one direction subject to a power in two or more persons enabling them to divert it in another direction, as in the case of a power of sale given to trustees in a strict settlement (*e*). Such a power must be construed strictly, and can only be exercised by the persons who are expressly or by reference designated as donees of the power (*f*).

On the other hand, where a testator first devises his real estate to trustees and their heirs, and afterwards empowers his trustees or trustee *for the time being* to sell, the testator must be considered to have contemplated a sale by the person or persons having the legal estate, and consequently the power can be exercised by the last surviving trustee, and after his death by his legal personal representatives, or, in the case of copyholds, by his heir or devisee (*g*).

If lands are devised to trustees in fee upon trust or with power to sell, and all the trustees disclaim or predecease the testator, so that the legal estate in fee descends to the heir-at-law of the testator, such trust or power cannot be exercised by the heir (*h*). In such a case it is necessary to have new trustees appointed by the Court under sect. 25 of the Trustee Act, 1893 (*i*). The donee of

(*e*) *Lane v. Debenham*, 11 Hare, 195.

survivor even since the C. A., 1881.

(*f*) *Townsend v. Wilson*, 1. B. & Ald. 608; *Newman v. Warner*, 1 Si. N. S. 457; *Rumney and Smith's Contract*, (1897) 2 Ch. 351. Apparently a bare power given to persons by name, and not attached to any estate or office, will not pass to the

(*g*) *In re Cunningham and Frayling*, (1891) 2 Ch. 567. *Re Pixton and Tong*, 46 W. R. 187.

(*h*) *Robson v. Flight*, 4 De G., J. & S. 613.

(*i*) 56 & 57 Vict. c. 53; *Nicholson v. Field*, (1893) 2 Ch. 511; *Sharp v. Sharp*, 2 B. & Ald. 405.

a power of appointing new trustees cannot appoint himself either solely or jointly with other trustees (*j*).

Where new trustees have been appointed under the statutory powers conferred by sect. 10 of the Trustee Act, or by the Court, they have the same powers, authorities, and discretions as if they had originally been appointed trustees by the instrument, if any, creating the trust (*k*).

When the new trustee is appointed out of Court, the legal estate can be vested in him by a vesting declaration under sect. 12 of the Trustee Act, 1893. When the new trustee is appointed by the Court, a vesting order should be obtained under sect. 26 of the same Act.

SECTION 2.

Time of Exercise of Express Trust or Power.

Where there is a *trust* to sell real estate, the trustees can perform the trust at any time, unless all the beneficiaries, having become *sui juris*, agree to take the property as realty. Any one of the beneficiaries can insist upon the trust being carried out (*l*). Even if the trust be to sell with all convenient speed, or to sell within a specified time, such language is directory and not imperative, and a purchaser cannot raise the objection that the time for selling has elapsed (*m*).

(*j*) *Re Newen*, (1894) 2 Ch. 297. 284; *Tweedie and Miles*, 27 C. D.

(*k*) 56 & 57 Vict. c. 53. s. 10, 315.

sub-s. 3; and s. 37. (*m*) *Pearce v. Gardner*, 10 Hare,

(*l*) *Biggs v. Peacock*, 22 C. D. 287.

Rule against Perpetuities.—It must be borne in mind, however, that the rule against perpetuities applies to trusts for sale as well as to powers of sale. Thus a trust for sale is void if it is directed to be made at a time which under the limitations of the deed or will *may* be beyond the period of a life in being and twenty-one years afterwards (*n*).

No limitation after an estate tail is too remote, and consequently a trust for sale which does not arise until after the determination of an estate tail is not void for perpetuity (*o*).

With regard to *powers* of sale, if there is no limit of time expressed for the exercise of the power, it is not on that account void, but must be exercised within the period fixed by the rule against perpetuities, and while the purposes of the settlement (whether made by deed or will) remain unexhausted (*p*).

As a general rule, a power of sale becomes extinguished when, by reason of the expiration or cesser of the limitations contained in the settlement, the absolute interests fall into possession (*q*).

But when it is clear, either from the express language of the instrument creating the power, or by necessary implication, that the settlor created the power *for the purpose of division*, because it is more convenient to make a division by selling the property and dividing the money, the power may be exercised after the estate

(*n*) *Goodier v. Edmunds*, (1893) 282-3.

3 Ch. 455; *In re Daveron, Bowen v. Churchill*, (1893) 3 Ch. 421; *In*

re Wood, Tullett v. Colville, (1894) 3 Ch. 381.

(*o*) *Heasman v. Pearse*, 7 Ch.

(*p*) *Lantsberg v. Collier*, 2 K. & J. 709.

(*q*) *Peters v. Lewes & East Grinstead Rail. Co.*, 18 C. D. at p.

433.

is "at home" (*i.e.*, after absolute interests have vested in possession); provided that it is exercised in reasonable time (*r*).

An unlimited collateral power of sale in a strict settlement by which estates tail are created is good (*s*), but if once an estate in fee has been acquired by any one claiming under the limitations of the settlement, the power becomes extinct (*t*). The Rule against Perpetuities does not apply to property given to charities. Consequently a power given to trustees of one charity to transfer its property in certain events to another charity need not be limited in time (*u*).

So far, we have discussed *express* powers of sale, both as regards the persons to exercise them and the time of exercise.

But such a power may also be *implied*.

SECTION 3.

Sale by Personal Representatives and Trustees under Implied or Statutory Powers.

Personal Representatives.—In the case of persons dying after the 1st January 1898, when the Land Transfer Act came into operation, real estate which is vested in any

(*r*) *Peters v. Lewes & East Grinstead Rail. Co.*, 18 C. D. 429; *In re Cotton's Trustees and the School Board for London*, 19 C. D. 624; *In re Lord Sudeley and Buines & Co.*, (1894) 1 Ch. 334; *In re Dyson and Fowke*, (1896) 2 Ch. 720.

(*s*) *Waring v. Coventry*, 1 M. & K. 249; *Re Lord Sudeley*, (1894) 1 Ch. at p. 339.

(*t*) *Cole and Sewell*, 4 Dr and W. 32.

(*u*) *Re Tyler*, (1891) 2 Ch. 352.

person without a right in any other person to take by survivorship, devolves on his death, notwithstanding any testamentary disposition, and becomes vested in his personal representatives or representative from time to time, as if it were as chattel real vesting in them or him (*v*).

The personal representatives have an implied power from the nature of their office to sell real estate so devolving on them for the payment of the testator's debts, and to satisfy the costs and expenses incurred in the administration of his estate. But unlike chattels real, which may be so sold by one of two or more executors without the concurrence of the others (*w*), it is not lawful for some or one only of several joint personal representatives without the authority of the Court to sell or transfer real estate (*x*).¹ The Land Transfer Act makes no provision for the case of one of several executors being absent or unable, from illness or other cause, to prove the will, and the executors who have proved the will cannot convey the legal fee simple without the concurrence of an executor who has not proved (*y*).² If, however, the other executor *renounces* probate, it is presumed that his concurrence is not necessary and that such renunciation operates as a disclaimer (*z*).

(*v*) Land Transfer Act, 1897, s. 1, sub-s. 1. It is presumed that this enactment only applies to real estate which is vested in a person solely for a devisable estate legal or equitable; see *Brickdale and Sheldon*, p. 237.

(*w*) *Simpson v. Gutteridge*, 1 Madd. 616. The rule probably applies to administrators; see *Williams* on

Executors, p. 821.

(*x*) 60 & 61 Vict. c. 65, s. 2, sub-s. 2.

(*y*) *Re Pawley and London and Provincial Bank*, (1900) 1 Ch. 58.

(*z*) See 20 & 21 Vict. c. 77, s. 79. The doubt raised in *Brickdale and Sheldon*, p. 254, on this point seems to be unfounded.

The power of sale of the personal representatives is, of course, extinguished if they have assented to a devise of the land or conveyed it to the devisee, or, in the case of an intestacy, have conveyed it to the heir-at-law (*a*).

If the personal representatives are in possession of the land, a purchaser may safely assume that there are unpaid debts, and that there has been no consent or conveyance to the devisee or heir.

On the other hand, if the devisee or heir is in possession, the onus will lie on the personal representatives to show that their power of sale has not been determined (*b*).

Charge of Debts and Legacies.—In the case of persons who died prior to the 1st January, 1898, the power of the personal representatives to sell depends on whether debts or legacies are charged on real estate, either by the express language of the will or by necessary implication.

A direction for payment of the testator's debts creates a charge for such payment on his realty (*c*), unless there is a subsequent charge on a specific part of his real estate which overbears the implied charge, on the principle, "expressum facit cessare tacitum" (*d*).

A mere *authority* to pay debts, as opposed to a *direction*, does not create a charge on real estate (*e*) nor, apparently, does a direction by the testator that his debts shall be paid by his executors (*f*).

Where there is a direction that the executors shall pay

(*a*) Cf. Land Transfer Act, 1897, s. 3.

(*b*) See *Brickdale and Sheldon*, p. 271.

(*c*) *Forbes v. Peacock*, 11 Sim. at p. 160.

(*d*) *Douce v. Lady Torrington*, 2 My. & K. 600; *Cowser v. Cartwright*, 8 Ch. at p. 975.

(*e*) *Re Head's Trustees and Macdonald*, 45 C. D. 310.

(*f*) *Brydges v. Landen*, 3 Ves. 550.

the testator's debts, followed by a gift of *all* his real estate to them *either beneficially or on trust*, all the debts will be payable out of all the estate so given to them (*g*). If there is an express charge of debts on real estate it will not be restricted, even though a fund be subsequently mentioned out of which debts are to be paid (*h*). With regard to the implied charge of legacies, it has been established by *the rule in Greville v. Brown* (*i*) that if there is a gift of legacies followed or preceded (*j*) by a devise of "the *residue* of my real and personal estate," or of "my real and personal estate *not otherwise disposed of*" (*k*), the legacies are charged on the residue, even though interests in land have been previously given by the will (*l*).

With regard to *specifically devised lands*, the question must always be one of intention, but the rule is that the presumption is against an intention to charge lands specifically devised, and that a mere charge "on all my lands," is not sufficient to rebut that presumption (*m*).

Lord St. Leonards' Act, 1859 (*n*) confers on *devisees in trust* to whom a testator dying after 13th August 1859, has devised real estate *for the whole of his estate or interest therein* (*o*) charged with the payment of debts or legacies, a power to raise the same, notwithstanding that the will does not contain an express power of sale. By sect. 16 of this

(*g*) *In re Tanqueray-Willaume and Landau*, 20 C. D. 465.

(*h*) *Wrigley v. Sykes*, 21 Beav. 337.

(*i*) 7 H. L. C. 689.

(*j*) *Elliott v. Dearsley*, 16 C. D. 322.

(*k*) *In re Barden*, (1894) 1 Ch. 688.

(*l*) *Bench v. Biles*, 4 Mad. 187.

(*m*) *Conron v. Conron*, 7 H. L. C. 190; but cf. *Bank of Ireland v. McCarthy*, (1898) A. C. 181.

(*n*) 22 & 23 Vict. c. 35, ss. 14 & 15.

(*o*) See *Adams and Perry's Contract*, (1899) 1 Ch. 554.

Act, if a testator creating such a charge shall not have devised the hereditaments so charged in such terms that his whole estate or interest shall become vested in any trustee or trustees, a like power is conferred on his executors; but this power does not extend to an administrator with the will annexed (*p*). Purchasers or mortgagees are not bound to inquire whether the powers conferred by sects. 14, 15, and 16 of the Act have been duly exercised by the persons acting in virtue thereof (*q*).

Thus, in the case of an executor selling under sect. 16, a purchaser is not, as a rule, entitled to inquire whether the debts of the testator have been paid. If, however, twenty years have elapsed since the testator's death, there is a presumption of law, known as "the rule in *Re Tanqueray-Willaume and Landau*" (*r*), that all debts have been paid, and the purchaser is put on his inquiry whether any debts in fact remain unpaid in respect whereof the executors can exercise their statutory power of sale.

The rule in *Re Tanqueray-Willaume and Landau* does not apply to the case of the sale by an executor of leasehold property which vests in, and can be sold by him *virtute officii*. In such a case the purchaser is not entitled to inquire whether debts have been paid, even after twenty years, unless the leaseholds are actually in the possession of a legatee (*s*).

If there is no charge of debts or legacies on real estate, a mere direction that the land is to be sold, without saying by whom, does not in the case of a testator who died

(*p*) *In re Clay and Tetley*, 16 C. D. 7.

(*s*) *In re Whistler*, 35 C. D. 561; *Venn and Furze's Contract*, (1894) 2 Ch. 101.

(*q*) Sect. 17.

(*r*) 20 C. D. 465.

before 1st January, 1898, entitle the executors to sell unless it is clearly implied that the produce of the sale is to pass through their hands in the execution of their office (*t*).

Trustees.—In the case of settlements, a power of sale is implied by a power to vary securities, if there is a declaration that purchased realty shall be considered as personality (*u*), and it is presumed that a power to vary investments will in any case imply a power of sale if land is an authorised investment, or becomes subject to the settlement by virtue of a covenant to bring in after-acquired property (*v*).

If a trustee has applied the trust funds in the purchase of real estate where such an investment was not authorised by the settlement, a purchaser from the trustees should require the concurrence of one of the beneficiaries, since the beneficiaries may elect to adopt the breach of trust and retain the property as realty (*w*).

SECTION 4.

Mode of Sale by Fiduciary Vendors.

In the case of express trusts or powers, the mode of sale authorised must be followed. If a sale by auction is directed at a sum mentioned in the instrument creating the trust, a sale by private contract at that sum must not

(*t*) *Bentham v. Wiltshire*, 4 Mad. 44; *Re Sankey*, W. N., (1889), 79.

tract, 25 C. D. 595; but cf. *Hope v. Hope*, 1 Jur. N. S. 770.

(*u*) *Tait v. Lathbury*, 1 Eq. 174.

(*w*) *Re Patten and Edmonton*, 52

(*v*) *Re Garnett and Orme's Con-*

L. J. Ch. 787.

be made, and *vice versa* (x); and when the sale is by auction, due notice and advertisements of the sale should be made (y). If the trust does not direct the mode of sale, it may be made either by public auction or private contract, and sect. 13 of the Trustee Act, 1893, which re-enacts sect. 35 of the Conveyancing Act, provides as to instruments coming into operation after the 31st December, 1881, that "when a trust for sale or a power of sale of property is vested in a trustee, he may sell, or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title, or evidence of title, or other matter as the trustee thinks fit, with power to vary any contract for sale, and buy in at any auction, or to rescind any contract for sale, and to resell without being answerable for any loss" (z).

Concurrence with other Owners.—Although trustees may concur with the owners of another property in selling both properties together, it is their duty to see that their share of the purchase-money is apportioned before completion; and a purchaser must take care of that likewise, because he can only pay trust money to the trustees. If it is not manifest that it is more beneficial to sell the two properties together, the purchaser should require the evidence of a competent surveyor that it is a prudent and right thing to do so (a).

Notwithstanding that the section quoted above gives

(x) *Daniel v. Adams*, Amb. 495. sub-ss. 1 and 3.

(y) *Ord v. Noel*, 5 Mad. 438. (a) *In re Cooper and Allan's Contract*, 4 C. D. 802.

(z) 56 & 57 Vict. c. 53, s. 13,

the trustees power to sell "*any part* of the property," they cannot sell the trust estate separate from the timber standing on it, or the minerals under it, without the sanction of the Court under sect. 44 of the Trustee Act, 1893 (*b*).

Consent of Tenant for Life.—By sub-sect. (2) of sect. 13, this section only applies "if and so far as a contrary intention is not expressed in the instrument creating the trust or power." Consequently where trustees are empowered to sell at the request and by the direction of the tenant for life, the purchaser should require evidence that such request and direction have, in fact, been given (*c*). Moreover, it should be borne in mind that if the land is settled land within the meaning of the Settled Land Acts, a power of sale cannot be exercised without the consent of the tenant for life (*d*), but the consent of any one of two or more persons constituting the tenant for life is sufficient (*e*). In the case of a *trust* for sale, the consent of the tenant for life is not necessary unless required by the terms of the settlement (*f*). If the consent of the tenant for life is required by the terms of the settlement, and the tenant for life has incumbered his life-estate, the concurrence of the incumbrancer must be obtained (*g*).

A trustee who is either a vendor or purchaser may sell or buy without excluding the application of sect. 2 of the Vendor and Purchaser Act, 1874 (*h*).

(*b*) *In re Skinner*, (1896) W. N. 68; and cf. Settled Land Act, 1882, s. 35.

(*c*) Underhill on Trusts, p. 255.

(*d*) Settled Land Act, 1882, s. 56.

(*e*) Settled Land Act, 1884, s. 6, sub-s. 2.

(*f*) *Ib.*, s. 6, sub-s. 1.

(*g*) *Re Bedingfield and Herring*, (1893) 2 Ch. 382.

(*h*) Trustee Act, 1893, s. 15.

SECTION 5.

Purchase by Persons in a Fiduciary Position.

Persons acting in a fiduciary character, such as trustees, executors, and administrators, trustees in bankruptcy, directors of companies, governors of charities, and agents for sale, such as auctioneers and other persons occupying a position with reference to the property or affairs of another inconsistent with the duties or interests of a purchaser, cannot themselves purchase the property with which they are thus connected or entrusted (*i*). Thus, mortgagees selling under a power of sale, an arbitrator contracting for unascertained claims of parties to the reference (*j*), commissioners for inclosure under a General Inclosure Act, who cannot purchase land in a parish in which an inclosure is made until five years from the date and execution of their award (*k*), or valuers acting under the Commons Inclosure Act, who are under a similar disability for the term of seven years (*l*), are all unable to purchase the property with which they are thus fiduciarily connected. A trustee, to preserve contingent remainders, may purchase from his *cestui que trust* (*m*).

A person who has never acted as trustee and has disclaimed the trust is under no disability (*n*), but a trustee cannot get rid of his incapacity, after he has once acted as trustee, by retiring from the trust (*o*). It must, however,

(*i*) See *Fox v. Mackreth*, Wh. & T. L. C., Vol. I. and notes thereto; *Dart, V. & P.* pp. 35-57.

(*j*) *Blennerhasset v. Day*, 2 Ba. & B. 116.

(*k*) 41 Geo. 3, c. 109, s. 2.

(*l*) 8 & 9 Vict. c. 118, s. 129.

(*m*) *Parkes v. White*, 11 Ves. 226.

(*n*) *Clark v. Clark*, 9 A. C. 733.

(*o*) *Ex parte James*, 8 Ves. 352.

be remembered that though a purchase by a trustee from himself, where he performs the two functions of seller and buyer, is always voidable (*p*), a purchase by the trustee from the *cestui que trust* may be supported if the relation of trustee and *cestui que trust* be previously dissolved, or the parties agree to stand with reference to each other in the character of vendor and purchaser (*q*), and the trustee behaves fairly and honestly.

A trustee may in some cases obtain the sanction of the Court to a sale by him to himself. A preliminary contract should be entered into and submitted to the Court for approval by summons under order 55, rule 3.

A solicitor may purchase from his client, but it is essential that the client should be advised by some disinterested solicitor, and it would rest with the solicitor purchasing to prove that he gave an adequate consideration (*r*); and if the solicitor purchase through the intervention of a third party, so that the client is not aware that the solicitor is the real purchaser, the transaction cannot be supported (*s*).

A relative of a disqualified person may purchase *bond fide* on his own account (*t*), and the Court will in the absence of fraud decree a specific performance at the suit of a purchaser (*u*).

A tenant for life under a settlement, whose consent

(*p*) *Williams v. Scott*, (1900) A. C. 503.

(*q*) *Gibson v. Jeyses*, 6 Ves. 277; *Coles v. Trecothick*, 9 Ves. 247; Underhill, pp. 405, 406; Lewin on Trusts, p. 538.

(*r*) *Edwards v. Meyrick*, 2 Hare,

63.

(*s*) *McPherson v. Watt*, 3 A. C. 254.

(*t*) *Ferraby v. Hobson*, 2 Ph. 261.

(*u*) *Prestage v. Langford*, 3 Mood. 248; *Coles v. Trecothick*, 9 Ves. 234.

is necessary to the exercise of a power of sale by the trustees, may nevertheless purchase from them under the power (*v*).

SECTION 6.

Mortgagees.

A sale by a mortgagee can be made either by virtue of an express power in the mortgage deed, or of the statutory powers conferred by the Conveyancing Act, 1881 (*w*), and Lord Cranworth's Act (*x*). The powers of these Acts may, however, be excluded by a *contrary intention* expressed in the indenture of mortgage (*y*), and only apply to mortgagees made by *deed*.

When Power of Sale arises.—The power of sale conferred on mortgagees by the Conveyancing Act arises “when the mortgage money has become due,” *i.e.*, after the day appointed for payment by the mortgage deed, which is usually fixed at six months from the date of the mortgage, in any of three following cases, *viz* :—(*z*)

- (1.) When notice requiring payment of the mortgage money has been served on the mortgagor, or one of several mortgagors, and default

(*v*) *Howard v. Ducane*, Turn. & R. 81; *Dicconson v. Talbot*, L. R. 6 Ch. 32; and cf. *Settled Land Act*, 1890, s. 12.

(*w*) 44 & 45 Vict. c. 41, ss. 19-22.

(*x*) 23 & 24 Vict. c. 145, ss. 11-16.

(*y*) *Conveyancing Act*, 1881, s.

19, sub-s. 3; *Lord Cranworth's Act*, s. 32. As to meaning of contrary intention, see article in *Law Times* newspaper, Vol. CVI. p. 598.

(*z*) *Conveyancing Act*, 1881, s. 19, sub-s. 1.

has been made in payment of the mortgage money or part thereof for three months after such service (*a*) ; or

- (2.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due (*b*) ; or
- (3.) There has been a breach of some provision contained in the mortgage deed or the Act, and on the part of the mortgagor or of some person concurring in making the mortgage to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon (*c*).

Power of Sale how exerciseable.—A mortgagee selling under a power of sale cannot be correctly classed under the head of Fiduciary Vendors. There is, in fact, no fiduciary relation between mortgagee and mortgagor until the mortgagee has realised his security and received more than enough to pay what is due upon it, in which case he stands in a fiduciary position with regard to the balance. Thus, not only can the mortgagee purchase the equity of redemption from the mortgagor (*d*), but he can sell the mortgaged estate under a power of sale to one or two mortgagors (*e*).

A mortgagee cannot sell to himself either alone or with others, nor to a trustee for himself (*f*), nor to

(*a*) Conveyancing Act, 1881, s. 20, sub-s. 1; and see also s. 67. (*e*) *Kennedy v. De Trafford*, (1896) 1 Ch. 762.

(*b*) *Ib.* s. 20, sub-s. 2. (*f*) *Downes v. Grazebrook*, 3 Mer.

(*c*) *Ib.* s. 20, sub-s. 3. 200; *Robertson v. Norris*, 1 Giff.

(*d*) *Knight v. Majoribanks*, 2 421.

any one employed by him to conduct the sale (*g*). With this exception a mortgagee can sell to anybody who can buy, provided that he acts *bond fide*, and does not fraudulently, wilfully, or recklessly, sacrifice the property of the mortgagor (*h*). The mortgagee has the right to obtain payment of his debt through the exercise of his power when it has arisen, without regard to the then existing condition of the market.

When the power of sale under the Act has become exerciseable the mortgagee can sell, or concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or private contract, subject to such conditions respecting title, or evidence of title, or other matter as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell without being answerable for any loss occasioned thereby (*i*). The ordinary power of sale does not authorise the mortgagee to sell fixtures apart from the freehold (*j*), and if such a power is expressly given, the mortgage deed must be registered as a bill of sale (*k*). The mortgagee cannot sell the land apart from the timber

(*g*) *Whitcomb v. Minchin*, 5 Madd. 91; *Martinson v. Clovers*, 21 C. D. 857. In *Nutt v. Easton*, (1899) 1 Ch. 873; 1900 1 Ch. 29, a sale by a mortgagee to his solicitor was upheld, but in that case there had been gross laches on the part of the plaintiff, and it was not clear that the solicitor ever acted in the matter of the sale.

(*h*) *Kennedy v. De Trafford*,

supra; *Furrar v. Furrars, Ltd.*, 40 C. D. 395; *Warner v. Jacob*, 20 C. D. 220. See also Conveyancing Act, 1881, s. 21, sub-s. 6.

(*i*) Conveyancing Act, 1881, s. 19, sub-s. 1.

(*j*) *Re Yates, Butchelor v. Yates*, 38 C. D. 112.

(*k*) *Johns v. Ware*, (1899) 1 Ch. 359.

unless he is a mortgagee in possession (*l*), nor can he sell the surface apart from the minerals except with the sanction of the Court under sect. 44 of the Trustee Act, 1893, as amended by sect. 3 of the Trustee Act, 1894.

What Mortgagee can convey.—A mortgagee exercising the power of sale conferred by the Conveyancing Act has power by deed to convey the property sold “*for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage*” (*m*).

A mortgagee can convey the property with all the legal incidents accompanying the grant, and can give the purchaser thereof implied easements of right over other parts of the mortgaged estate (*mm*).

The mortgagee is enabled to sell so as to give the purchaser the estate discharged from the equity of redemption, but an equitable mortgagee cannot convey the legal estate (*n*).

In the case of copyholds, the legal right to admittance does not pass by a deed under the Conveyancing Act unless the deed is “sufficient otherwise by law, or is sufficient by custom in that behalf,” so that where a mortgagee of copyholds has had a surrender, with a legal right to admittance on payment of a fine, he cannot pass such legal right of admittance without being first admitted himself (*o*).

(*l*) Conveyancing Act, 1881, s. 19, subs. 1, cl. 4.

(*m*) *Ib.* s. 21, sub-s. 1.

(*mm*) *Born v. Turner*, 1900, 2 Ch. 211.

(*n*) *In re Hodson and Howes Contract*, 35 C. D. 668.

(*o*) Conveyancing Act, 1881, s. 21, sub-s. 1.

Protection of Purchaser.—Where a conveyance is made *in professed exercise* of the power of sale conferred by the Act, the title of the purchaser is not impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised. In the case of a *bond fide* purchaser the only remedy of the person damaged is against the mortgagee who exercised the power (*p*). But if the purchaser knew that notice had not been given, or any other irregularity committed, the sale may be set aside (*q*); and the purchaser is entitled, if he likes, to enquire whether the vendor is in a position to exercise the power, for the provisions of sect. 21 are for the protection of the purchaser and not for the benefit of the vendor (*r*).

A mortgagee, at any time after the power of sale conferred by the Conveyancing Act has become exercisable, can recover the title-deeds which a purchaser would be entitled to demand from the mortgagor or subsequent mortgagees (*s*).

By whom exercisable.—The powers of a mortgagee under the Conveyancing Act may be exercised by “any person for the time being entitled to receive and give

(*p*) Conveyancing Act, 1881, s. 21, sub-s. 2; and cf. similar provision in s. 13 of Lord Cranworth's Act, and see *Bailey v. Burnes*, (1894) 1 Ch. 25.

(*q*) *Selwyn v. Garfit*, 38 C. D. 273.

(*r*) *Re Life Interest &c. Corporation v. Hand in Hand Insurance Society*,

(1898) 2 Ch. at p. 238. A similar opinion was expressed by Chitty, L. J., in the course of the argument in *Re Rumney and Smith*, but the dictum is not reported.

(*s*) Conveyancing Act, 1881, s. 21, sub-s. 7; and cf. Lord Cranworth's Act, s. 16.

a discharge for the mortgage money" (*t*); that is to say, by the original mortgagee, his executors, administrators and assigns (*u*), and where there are two or more mortgagees by the survivor of them (*v*).

Distinction between Lord Cranworth's and the Conveyancing Acts.—The powers of sale conferred by Lord Cranworth's Act may still be exercised by mortgagees in the case of mortgage deeds executed after the 28th August, 1860, and before the 1st January, 1882 (*w*).

The provisions of Lord Cranworth's Act are similar to those of the Conveyancing Act, but with the following important differences:—

(1.) The powers of Lord Cranworth's Act cannot be exercised until after the expiration of *one year* from the time when the principal money shall have become due, or after any interest on such principal money shall have been in arrear for *six months*, or after any omission to pay any premium on any insurance which, by the terms of the deed, ought to be paid by the person entitled to the property subject to the charge (*x*).

(2.) Under the Conveyancing Act, the power of sale is in no case exerciseable until "the mortgage money has become due," *i.e.* after default; but under Lord Cranworth's Act it seems to

(*t*) Conveyancing Act, 1881, s. 21, sub-s. 3 (4).

(*u*) *Ib.* s. 2 (vi.). For an instance of an express power not exercisable by a transferee, see *In re Rumney & Smith*, (1897) 2 Ch. 351.

(*v*) *Hind v. Poole*, 1 K. & J. 383; and see Conveyancing Act, 1881, s. 61.

(*w*) Conveyancing Act, 1881, s. 71; *In re Solomon and Meagher's Contract*, 40 C. D. at p. 510.

(*x*) Lord Cranworth's Act, s. 11.

be exerciseable where interest is six months in arrear, although the principal money is not yet due.

- (3.) The notice to the mortgagor required by Lord Cranworth's Act is *six months*, and must be given in every case (*y*), whereas under the Conveyancing Act no notice is required if interest is two months in arrear.
- (4.) Lord Cranworth's Act is confined to *herediments* (*z*), whereas the Conveyancing Act applies to property generally.
- (5.) An *equitable* mortgagee under Lord Cranworth's Act can convey whatever legal estate was in the mortgagor at the time of the mortgage (*a*).

(*y*) Lord Cranworth's Act, s. 13.
(*z*) *Ib.* s. 11.

(*a*) *Ib.* s. 15; *In re Solomon and Meagher's Contract*, 40 C. D. 508.

CHAPTER VII.
LIMITED OWNERS.

SECTION 1.

Sales under the Settled Land Acts.

IN a large number of cases the vendor is not the absolute owner of the property which he desires to sell, but proposes to avail himself of the statutory powers conferred on limited owners by the Settled Land Acts, 1882-1890. Under these circumstances, the vendor, before entering into the contract of sale, should satisfy himself as to the following points, viz.:—

- I. Is he a tenant for life, or a person having the powers of a tenant for life, for the purposes of the Settled Land Acts? If this question must be answered in the negative, the other points do not arise.
- II. What estate has he power under the Acts to convey?
- III. Are there trustees in existence for the purposes of the Acts? If not, such trustees must be appointed.
- IV. Is the assent of the trustees necessary to the sale of the property?

It is proposed to consider these four points in detail.

SECTION 2.

Who is Tenant for Life.

Definition of Tenant for Life.—A tenant for life for the purposes of the Settled Land Acts is "the person who is for the time being under a settlement beneficially entitled to possession of settled land for his life" (*a*). If in any case there are two or more persons so entitled as *tenants in common* or as *joint tenants*, or for other concurrent estates or interests, they together constitute the tenant for life (*b*). "Settled land" means land or incorporeal hereditaments and any estate or interest therein which is the subject of a settlement (*c*); and the determination of the question whether land is "settled land" is governed by the state of facts, and the limitations of the settlement at the time of the settlement taking effect (*d*).

Settlement.—A "settlement" is defined as any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of Court Roll, Act of Parliament, or other instrument, or any number of instruments, under or by virtue of which any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession (*e*).

The words "stands limited to or in trust for any persons by way of succession" have no technical force, and are not restricted to freehold estates. "They include the case of a jointure and portions for younger children

(*a*) Settled Land Act, 1882; 45 & 46 Vict. c. 38, s. 2, sub-s. 5.

(*b*) *Ib.* s. 2, sub-s. 6.

(*c*) *Ib.* s. 2, sub-s. 3 and 10.

(*d*) *Ib.* s. 2, sub-s. 4.

(*e*) *Ib.* s. 2, sub-s. 1.

limited to arise on or after the death of a tenant for life" (*f*).

There may at the same time be a more comprehensive settlement consisting of several deeds, and a less comprehensive settlement, constituted by one of the deeds only (*g*).

A settlement which is constituted by more than one instrument is generally known as a *compound settlement*. A compound settlement may be constituted by a will and a deed (*h*), or by two or more deeds (*i*), or by a will or deed together with an Act of Parliament (*j*).

The definition of tenant for life which has been given above must be taken in connection with sect. 63 of the Settled Land Act, 1882, which deals with trusts for the immediate sale of land. But the powers of a tenant for life under that section can only be exercised with the leave of the court (*k*), and in practice are never resorted to for the purpose of selling land.

Limited Owners with Powers of Tenants for Life.—The following limited owners have the powers of a tenant for life under the Settled Land Acts, when the estate or interest of each of them is in possession (*l*), viz.:

(i.) A tenant in tail, including a tenant in tail who is restrained from barring the entail by special

(*f*) *Re Mundy and Roper*, (1899) 1 Ch. 290-1.

(*g*) *Ib.* p. 295.

(*h*) *In re Mundy's Settled Estates*, (1891) 1 Ch. 399; *In re Byng's Settled Estates*, (1892) 2 Ch. 219.

(*i*) *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch. 345. *Re*

Mundy and Roper, supra.

(*j*) *Vine v. Raleigh*, (1896) 1 Ch. 37.

(*k*) Settled Land Act, 1884, s. 7, sub-s. 1.

(*l*) Settled Land Act, 1882, s. 58, sub-s. 1.

Acts of Parliament, as in the case of the Shrewsbury and Abergavenny estates; but not including such a tenant in tail where the estate was purchased with money provided by Parliament in consideration of public services; as, for instance, the Wellington and Nelson estates.

- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or any other event (*m*).
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under the Act shall bind the Crown (*n*).
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent.
- (v.) A tenant *pur autre vie* holding merely under a lease at a rent (*o*).
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate or by conditional limitation or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*p*).

(*m*) See *infra*, "Devise," p. 127.

(*n*) See *infra*, "Entail," p. 139.

This does not apply to the tenant for life of a base fee. *Re Morshead's Settled Estates*, W.N. (1893), 180.

(*o*) See *infra*, "Descent," p. 121.

(*p*) Cf. *Re Paget*, 30 C. D. 161;

Williams v. Jenkins, (1893) 1 Ch. 700. *Re Edwards' Settlement*, (1897) 2 Ch. 412.

- (vii.) A tenant in tail after possibility of issue extinct (*q*).
- (viii.) A tenant by the courtesy (*r*), which is to be deemed to be an estate arising under a settlement made by his wife (*s*).
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy, or other event (*t*).

SECTION 3.

Powers of the Tenant for Life.

Where the vendor is a tenant for life, or a person having the powers of a tenant for life, he may sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same (*u*). The sale may be made in lots, and either by auction or private contract, and the vendor may make conditions as to title, user of the land, mines and minerals, &c. (*v*).

The sale should be made at the best price that can reasonably be obtained (*w*), and the tenant for life should have regard to the interests of all parties entitled under

(*q*) See *infra*, "Entail," p. 139.

(*u*) Settled Land Act, 1882, s. 3,

(*r*) See *infra*, "Curtesy," p. 150.

sub-s. 1.

(*s*) Settled Land Act, 1884, s. 8.

(*v*) *Ib.* s. 4, sub-ss. 3, 4, 5, 6.

(*t*) Cf. *Re Pocock and Prankerd*,

(*w*) *Ib.* s. 4, sub-s. 1.

the settlement (*x*) ; but a purchaser dealing in good faith shall be conclusively taken to have given the best price that could reasonably be obtained (*y*).

A conveyance by a tenant for life is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

- (i.) All estates, interests, and charges *having priority to the settlement*. This exception is practically rendered nugatory by recent decisions which appear to show that, however often the estate has been disentailed and resettled, the series of deeds constitute one compound settlement.
- (ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money *actually raised* at the date of the deed, as, for example, by mortgage of the property or the creation of a term or interest therein (*z*).
- (iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth or agreed so to be, before the date of the deed, by the tenant for life, or any of his predecessors in title, or by any trustees for him or

(*x*) Settled Land Act, 1882, s. 53 ;
and cf. *Re Marquis of Ailesbury's Estates*, (1892) A. C. 356.

(*y*) *Ib.* s. 54.
(*z*) See *Keck and Hart's Contract*, (1898) 1 Ch. 624.

them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life (a).

A prohibition or limitation in a settlement against the exercise by a tenant for life of his statutory powers is void (b), and so too is a contract by the tenant for life not to exercise such powers (c). The powers of a tenant for life are not assignable (d), but if a tenant for life sells or mortgages his life estate, he can only sell with the consent of the assignee (e). This provision, however, being for the benefit of the assignee may be waived by him; and if the instrument of assignment contains a consent by the assignee beforehand, all the powers of the tenant for life under the Act remain (f). If a tenant for life assigns or charges his life-estate by his marriage settlement, or by a deed of family arrangement, he can still sell without the consent of the assignees (g). If the tenant for life surrenders his life estate to the remainder-ance, it is presumed that his powers are extinguished (h).

SECTION 4.

Trustees for the Purposes of the Settled Land Acts.

The following persons are trustees for the purposes of the Settled Land Acts :—

(a) Settled Land Act, 1882, s. 20,
sub-s. 2.

(b) *Ib.* s. 51.

(c) *Ib.* s. 50, sub-s. 2.

(d) *Ib.* s. 50, sub-s. 1.

(e) *Ib.* s. 50, sub-s. 3.

(f) *Du Cane and Nettlefold*, (1898)
2 Ch. at p. 109.

(g) Settled Land Act, 1890, s.

4.

(h) *Re Mandy and Roper*, (1899) 1
Ch. 297.

- (1.) The persons who are by the settlement declared to be trustees thereof for the purposes of the Acts (*i*).
- (2.) The persons, if any, who are for the time being under the settlement trustees with power of or power to consent to a sale of the settled land (*j*), or with future power of sale, or under a future trust for sale, or with power of consent to the exercise of such future power, and whether the power or trust takes effect in all events or not (*k*).
- (3.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of *any other land* comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to the exercise of such a power of sale (*l*).
- (4.) Trustees appointed upon summons by a judge in chambers under sect. 38 of the principal Act.

In the case of a settlement constituted by a series of instruments, it is necessary to obtain the appointment by the Court of trustees of the compound settlement so constituted (*m*).

But where the tenant for life has assigned his estate, by marriage settlement or deed of family arrangement,

- | | |
|---|---|
| (<i>i</i>) Settled Land Act, 1890, s. 2,
sub-s. 8.
(<i>j</i>) Settled Land Act, 1882, s. 2,
sub-s. 8.
(<i>k</i>) Settled Land Act, 1890, s. 16, | sub-s. 2.
(<i>l</i>) <i>Ib.</i> s. 16, sub-s. 1.
(<i>m</i>) <i>Re Marquis of Ailesbury</i> ,
(1893) 2 Ch. at p. 358; <i>Re Mundy</i>
<i>and Roper</i> (1899) 1 Ch. at p. 281. |
|---|---|

although the deed of assignment is *deemed* to be one of the instruments creating the settlement (*n*), this is only for the purpose of excluding the operation of sect. 50 of the Act of 1882, and there is no necessity to appoint trustees of a compound settlement (*o*).

The tenant for life, before exercising his power of sale, must give not less than one month's notice of his intention to the trustees and also to their solicitor (*p*), but a general notice is sufficient without specifying any specific sale which may be contemplated at the time (*q*), and the trustees may by writing waive notice in any particular case or generally, and may accept less than one month's notice (*r*).

The purchaser is not concerned to inquire whether due notice has been given (*s*).

The number of trustees must not be less than *two*, unless a contrary intention is expressed in the settlement (*t*).

The purchase money may be paid into court or to the trustees at the option of the tenant for life (*u*), but in practice the latter course is generally adopted, and in that case the trustees must join in the conveyance in order to give the purchaser a receipt for the purchase-money (*v*). Whichever course is adopted, it is necessary that there should be trustees of the settlement in existence; and the purchaser, before completing, must ascertain that there

(*n*) Settled Land Act, 1880,
s. 4.

(*o*) *Du Cane and Nettlefold's Contract*, (1898) 2 Ch. 96.

(*p*) Settled Land Act, 1882, s. 45,
sub-s. 1.

(*q*) Settled Land Act, 1884, s. 5,

sub-s. 1.

(*r*) *Ib.* s. 5, sub-s. 3.

(*s*) Settled Land Act, 1882, s. 45,
sub-s. 3.

(*t*) *Ib.* s. 39, and s. 45, sub-s. 2.

(*u*) Settled Land Act, 1882, s. 22.

(*v*) *Ib.* s. 40.

are duly appointed trustees for the purposes of the Act (*w*), although, of course, the contract of sale is good notwithstanding the non-existence of trustees.

SECTION 5.

Powers of Settled Land Act Trustees.

As a general rule, the trustees have nothing to do with the sale except to receive notice of the tenant for life's intention to sell, and to give a receipt for the purchase-money, although, if they consider the sale improvident, they have power to submit the matter to the court (*x*). They are not parties to the sale, and their consent is quite unnecessary. To this rule, however, there are two important exceptions. (1) When the *principal mansion-house* on any settled land, which is not usually occupied as a farm-house, together with pleasure-grounds, park, and lands usually occupied therewith, exceeding twenty-five acres in extent are to be sold, the consent of the trustees is necessary (*y*); (2) When the tenant for life is himself the purchaser, in which case the trustees stand in the place of the tenant for life as vendor (*z*).

(*w*) *Mogridge v. Clapp*, (1892) 3 Ch. at p. 400. *Re Fisher and Grazebrook*, (1898) 2 Ch. 660.

(*x*) Settled Land Act, 1882, s. 44.
(*y*) Settled Land Act, 1890, s. 10.
(*z*) *Ib.* s. 12.

CHAPTER VIII.

POWERS CONFERRED BY LANDS CLAUSES
CONSOLIDATION ACT, 1845.

SECTION 1.

Powers Conferred by the Act.

THE compulsory taking of lands for undertakings of a public nature is now regulated by the Lands Clauses Consolidation Act (*a*), which empowers the promoters of an undertaking to agree with the owner of lands by the special Act authorised to be taken, and with all persons having any interest in such lands by that or the special Act enabled to sell and convey the same, for the absolute purchase thereof and of all estates and interests therein (*b*).

It shall be lawful for all parties seised, possessed of, or entitled to any such lands, or any estate or interest therein, to sell, convey, or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose, and particularly it shall be lawful for all or any of the following parties so seised, possessed or

(*a*) 8 & 9 Vict. c. 18.(*b*) *Ib.* s. 6.

entitled as aforesaid, so to convey or release (that is to say), all corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject to any estate in dower, or to any lease for life or for lives and years, or for years or any less interest; and the power so to sell and convey or release as aforesaid may lawfully be exercised by all such parties other than married women entitled to dower, or lessees for life or for lives and years, or for years or for any less interest, not only on behalf of themselves and their respective heirs, executors, administrators and successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them, or in defeasance of the estates of such parties, and as to such married women, whether they be of full age or not, as if they were sole and of full age, and as to such guardians on behalf of their wards, and as to such committees on behalf of the lunatics and idiots of whom they are the committees respectively, and that to the same extent as such wives, wards, lunatics, and idiots respectively could have exercised the same power under the authority of this or the special Act if they had respectively been under no disability, and as to such trustees, executors and administrators on behalf of their *cestuis que trust*, whether infants, issue unborn, lunatics, *femæ covert*, or other persons, and that to the same extent as such *cestuis que trust* respectively could have exercised the same powers under the authori-

ties of this and the special Act if they had respectively been under no disability (*c*).

A municipal corporation cannot sell under the Act without the approbation of the Local Government Board (*d*), and committees of lunatics should not exercise the powers conferred on them by the Act without the consent of the court of lunacy (*e*).

Although section 7 of the Act refers to trustees as persons who are able to convey, the latter part of the section shows that it was not intended to substitute them for persons who are beneficially entitled, and under no disability whatever, to sell (*ee*).

SECTION 2.

Notice to Treat (*f*).

Nature of Notice.—The first step which must be taken by the promoters, if they require to purchase lands under the powers of the Act, is to give Notice to Treat. This Notice must be given (1) to all parties interested in such lands; or (2) to the parties enabled by the Act to sell or convey or release the same; or (3) such of the said parties as shall after diligent inquiry be known to the promoters. The Notice must demand from such parties the particulars of their estate and interest in such lands and of the claims made by them for compensation (*g*), and must state the quantity and situation of the land proposed to be taken, a plan whereof is usually annexed.

Effect of Notice.—The effect of the Notice to Treat is to fix the extent of the land to be taken and to place the

(*c*) 8 & 9 Vict. c. 18, s. 7.

(*d*) *Ib.* s. 15.

(*e*) *In re Wade*, 1 H. & Tw. 202.

(*ee*) *Peters v. L. & E. G. Ry. Co.*, 18 C. D. 440.

(*f*) Lands Clauses Act, s. 18, as to service of notice, see ss. 19 & 20.

(*g*) As to compensation for damage in addition to the purchase price, see s. 63.

promoters under a legal obligation to take and pay for such land, and it is in every case a necessary preliminary (*h*).

Although after notice has been given the parties stand in a position analogous to that of vendor and purchaser (*i*), yet their rights are only rights given by the Act, and any proceedings to enforce those rights must be taken under the Act. It is not until the purchase-money has been ascertained, either by agreement or by one of the methods which the Act provides, that the actual relation of vendor and purchaser, with all the rights and obligations incident thereto, is established between the parties. Thus, after Notice to Treat, but before the price is fixed, no contract is arrived at which can be enforced by an action for specific performance (*j*), and if the owner dies, the purchase-money when ascertained will belong to his heir or devisee (*k*). On the other hand, when once the purchase-money has been fixed, the Court will enforce specific performance of the contract (*l*). If the promoters go into possession before the purchase-money has been fixed, they will be liable to interest at £4 per cent. as from the time of their taking possession (*m*).

When Notice must be given.—Notice to Treat must be given within the period prescribed by the special Act for the exercise by the promoters of their powers of compulsory purchase, or if no period is prescribed within

- (*h*) *Tiverton and North Devon Rail. Co.*, 9 A. C. at p. 503.
(*i*) *Ib.* at p. 489.
(*j*) *Adams v. London and Black-well Rail. Co.*, 2 M. & G. 118.
(*k*) *Battersea Park Acts*, 32 Beav.

891.

- (*l*) *Harding v. Metropolitan Rail. Co.*, 7 Ch. 154.
(*m*) *Rhys v. Dene Valley Rail. Co.*, 19 Eq. 93.

three years from the passing of the Special Act (*n*). If, however, the notice is given within the three years, the machinery for completing a compulsory purchase may be set in motion and worked by either party after the three years have expired (*o*).

SECTION 3.

Machinery by which a Compulsory Purchase is carried out.

By Agreement.—After notice to treat has been given, the amount of compensation to which the owner of the land is entitled is frequently settled by agreement between the parties (*p*). If, however, the owner is a person under a disability, and has no power to sell except under the Lands Clauses Act, he is incapacitated from fixing the price for the land taken (*q*), but he may either agree to sell at the price to be fixed by two surveyors under sect. 9, or he may contract to sell at a named price which is subsequently to be tested by surveyors (*r*).

By sect. 9 it is provided that where the person is under disability the purchase-money or compensation to be agreed upon shall not be less than shall be determined by the valuation of two practical surveyors, one to be nominated by the promoters and the other by the other party; and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices

(*n*) 8 & 9 Vict. c. 18, sect. 123.

(*o*) *Tiverton and North Devon Rail. Co. v. Loosemore*, 9 A. C. at p. 484.

(*p*) 8 Vict. c. 18, s. 22.

(*q*) *Bridgend Gas & Water Co. v. Dunraven*, 31 C. D. 221.

(*r*) *Peters v. Lewes & East Grinstead Rail. Co.*, 18 C. D. 429.

shall, upon application of either party after notice to the other party for that purpose, nominate.

The section also requires a *declaration in writing* to be annexed to the valuation by each of the surveyors if they agree, or, if not, by the surveyor nominated by the justices verifying the correctness of the valuation, and such declaration is essential to its validity (s).

If no agreement can be arrived at between the parties, there are two alternative courses open to the promoters under the provisions of the Act.

**First Method of carrying out the Purchase otherwise than
by Agreement.**

The first method is that usually adopted by municipal corporations, who do not as a rule desire to take possession of the land until the amount of compensation has been ascertained.

If the compensation claimed does not exceed £50, the same is settled by two justices (t).

In other cases the proper course is for the promoters to give ten days' notice of their intention to cause a jury to be summoned, and in such notice must state what compensation they are willing to give (u). The person claiming compensation then has an option to have the amount of compensation settled by arbitration, but he must exercise this option by notice to the promoters before they have issued their warrant to the sheriff to summon a jury (v). If the party claiming compensation desires

(s) *Bridgend Gas & Water Co.*, 24.
supra. (u) *Ib. s. 38.*
(t) 8 & 9 Vict. c. 18, ss. 22 and (v) *Ib. s. 23.*

arbitration, the compensation is settled by arbitrators in the manner provided in sects. 25-37 of the Act, as amended by the Lands Clauses Umpire Act, 1883. If the party claiming compensation does not elect in favour of arbitration, the matter is settled by a jury in the manner prescribed by sects. 39-50, or by a special jury if either of the parties so desire (*w*).

Absent Parties.—If the party entitled to compensation is abroad or cannot be found, the promoters are entitled to have the compensation assessed by a surveyor, to be nominated by two justices (*x*). If, however, the absent party is dissatisfied with the valuation of the surveyor, he can afterwards require the question of compensation to be submitted to arbitration (*y*).

Second Method of carrying out the Purchase otherwise than by Agreement.

The course which is adopted where the promoters desire immediate possession of the lands is as follows (*z*) :—The promoters apply to two justices, or, in the case of a Railway Company, to the Board of Trade (*a*), to have a surveyor appointed, and this surveyor determines what is, in his opinion, the value of the land as to which Notice to Treat has been given. The sum so ascertained is deposited by the promoters at the Bank of England to the account of the Paymaster-General. The promoters then give to the parties entitled to sell the land a bond with two sufficient sureties in a penal sum equal to the sum

(*w*) 8 & 9 Vict. c. 18, ss. 54-56.

(*z*) *Ib.* s. 85.

(*x*) *Ib.* ss. 58-60.

(*a*) Railway Companies Act, 1867,

(*y*) *Ib.* ss. 64-65,

s. 39.

deposited, to secure payment of such compensation as may be eventually fixed, with interest thereon at 5 per cent.

Upon complying with these requisites, the promoters are entitled to enter upon and use the land; but although they cannot be ejected by the owner, they do not acquire the legal estate, and the owner has a lien on the land for the amount of the compensation and interest which may ultimately be found due to him (*b*).

The duty of taking steps for ascertaining the amount of compensation, is thrown upon the owner, and no power is given to the promoters to initiate proceedings for settling the amount (*c*).

The sixty-eighth section of the Lands Clauses Act gives the owner a short and simple remedy for compelling compensation from the promoters. If he desires to have the compensation settled by arbitration, and gives notice of his desire to the promoters, the compensation will, in that case, be settled by arbitration in the manner provided by sects. 25-37 of the Act. If, on the other hand, the owner desires to have the compensation settled by a jury, and gives notice of his desire to the promoters, they are bound within twenty-one days either to pay the amount he demands, or else to issue their warrant to the sheriff to summon a jury in the manner provided by sects. 39-57 of the Act. If the promoters fail to issue their warrant for a jury within twenty-one days, they are liable to pay the amount of compensation claimed by the owner, and he can recover the same with costs by action in any of the superior Courts.

(*b*) *Wing v. Tottenham & Hampstead Junction Rail. Co.*, 20 L. J., Q. B. 249.

(*c*) *Doe d. Armistead v. North*

SECTION 4.

Payment of the Purchase Money.

When the owner is under a disability and not entitled to sell or convey, except under the provisions of the Lands Clauses Act or the Special Act, then the purchase-money or compensation for damage is paid as follows :—

- (1.) If such money exceeds £200, it must be paid into the bank to the account of the Paymaster General *ex parte* the promoters and in the matter of the Special Act (*d*).
- (2.) If such money does not amount to £200 but exceeds £20, it can either be paid into the bank or to two trustees to be nominated by the parties entitled to the rents and profits of the lands (*e*).
- (3.) If such money shall not exceed £20, the same shall be paid to the parties entitled to the rents and profits of the lands for their own use and benefit; or in case of incapacity of such persons, the same money shall be paid for their use to their respective guardians, husbands, committees, or trustees (*f*).

SECTION 5.

Conveyances.

Upon the deposit in the Bank of the purchase-money or compensation, all parties by the Act enabled to sell or

(*d*) 8 & 9 Vict. c. 18, s. 69,
S.C. Funds Rules, rule 39.

(*e*) *Ib.* s. 71.
(*f*) *Ib.* s. 72.

convey lands shall, when required so to do by the promoters of the undertaking, convey the lands to them or as they shall direct, and in default thereof, or if the owner fail to adduce a good title to such lands to their satisfaction, it shall be lawful for the promoters, if they think fit, to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation, under the hands and seals of the promoters or any two of them, containing a description of the lands in respect of which such default shall be made ; and upon such deed poll being executed in the manner directed by the Act, all the estate and interest in such lands of or capable of being sold or conveyed by the party between whom and the promoters such agreement shall have been come to, or as between whom and the promoters such purchase or compensation shall have been determined, shall vest absolutely in the promoters, and as against such parties and all parties on behalf of whom they are by the previous provisions of the Act enabled to sell and convey, the promoters of the undertaking shall be entitled to the immediate possession of such lands (g).

If the owner of such lands, or of any interest therein, on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same, or neglect or fail to make out a title to such lands or to the interest therein claimed by him to the satisfaction of the promoters, or if he refuse to convey such lands as directed by the promoters, or if any such owner be absent from the kingdom or cannot after diligent

inquiry be found or fail to appear on the inquiry before a jury as therein provided, it shall be lawful for the promoters to deposit the purchase-money in the Bank (*h*). And upon such deposit it shall be lawful for the promoters, if they think fit, to execute a deed poll as provided for by the 75th section of the Act, which is to vest in the promoters all the estate in the lands described therein of the parties for whose use such purchase-money or compensation shall have been deposited (*i*).

Conveyances of lands to be purchased under the provisions of that or the special Act may be according to the forms in the schedules to the Act, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and conveyances made according to the forms in the schedule, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of years attendant by express declaration or construction of law, and to bar all estates tail and all other estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever in the said lands; but although terms of years be thereby merged, they shall, in equity, afford the same protection as if they had been kept on foot (*j*).

Every conveyance to the promoters of lands of copyhold or customary tenure is to be entered by the steward of the manor upon the Court rolls; and upon payment of such fees as would be due to him on the surrender of the same

(*h*) 8 & 9 Vict. c. 18, s. 76.

(*i*) *Ib.* s. 77.

(*j*) *Ib.* s. 81.

lands to the use of a purchaser, he is to make such inrolment, and the conveyance, when so inrolled, is to have the effect in respect of such lands as if the same were of freehold tenure; and until the same are enfranchised they are to continue subject to the accustomed fines, heriots and services (*k*); and it has been held that under this provision the steward cannot claim the fee which would be payable on the admittance of a purchaser (*l*).

SECTION 6.

Special Provisions of the Lands Clauses Act.

The Act also contains special provisions enabling the promoters to redeem mortgages on the lands taken (*m*), to release the lands from rent-charges (*n*), and to satisfy the rights of commoners over the waste of the manor (*o*). Provision is also made for the compensation of leaseholders, tenants from year to year, and tenants at will (*p*).

The Act also contains provisions enabling the promoters, upon the discovery at any time of the existence of outstanding estates or interests, the purchase whereof may have been omitted by mistake, to purchase the same compulsorily; and prescribes the manner in which the value thereof is to be estimated, and provides for the payment of the costs of litigation with reference to such lands (*q*).

(*k*) 8 & 9 Vict. c. 18, ss. 95 and
96.

(*l*) *Cooper v. Norfolk Rail. Co.*,
3 Exch. 546.

(*m*) 8 & 9 Vict. c. 18, ss. 108-114.

(*n*) Sects. 115-118.

(*o*) Sects. 101-107.

(*p*) Sects. 119-122.

(*q*) Sects. 124-126.

Superfluous Lands.—The promoters are, within the time prescribed by the special Act, or, if no period be prescribed within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking (*r*). Such superfluous lands, unless they be situate in a town (*s*), or be lands built upon or used for building purposes, are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed, or, if he refuse, or for six weeks neglect to signify his wish to purchase the same, or cannot be found, then to other adjoining owners; and unless a sale be made either to such person or adjoining owners, the superfluous lands remaining unsold after such period are to vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same (*t*). But a company may contract for a sale of superfluous lands before having made the prescribed offers, and having subsequently made the same and had them refused may enforce the contract (*u*). The sale must be an absolute

(*r*) Sect. 127. This section is not incorporated in the Public Health Act, 1875, or in the Gas-works Clauses Act, 1871.

(*s*) As to what are lands situate within a town within the meaning of this section (128), see *Elliot v. South Devon Rail. Co.*, 5 Rail. Ca. 500.

(*t*) 8 & 9 Vict. c. 18, ss. 127-129. As to what are superfluous lands within the meaning of these

sections, see *Coventry v. L. B. and S. C. Rail. Co.*, L. R. 5 Eq. 104; *London and S. W. Rail. Co. v. Blackmore*, L. R. 4 H. L. 610; *Betts v. Great Eastern Rail. Co.*, L. R. 8 Ex. 294; *Great Western Rail. Co. v. May*, L. R. 7 H. L. 283; *Re Metropolitan District Rail. Co. and Cosh*, 13 C. D. 607.

(*u*) *London and Greenwich Rail. Co. v. Goodchild*, 8 Jur. 455.

one; and if an option of re-purchase is reserved the sale is void (*v*).

In every conveyance by the promoters the word grant shall operate as express covenants by the promoters with the grantees therein named, that they were seised in fee, for quiet enjoyment, free from incumbrances by the promoters, and for further assurance (*w*).

SECTION 7.

Costs.

The provisions of the Lands Clauses Act with regard to costs are briefly as follows :—

- (1.) In the case of an arbitration (*x*) or assessment by a jury (*y*), if the amount of compensation awarded is the same or less than the sum offered by the promoters, each side pays his own costs. If more is awarded, all costs are borne by the promoters.
- (2.) The costs of a valuation by a surveyor, in the case of absent parties, are always borne by the promoters (*z*).
- (3.) In the case of an arbitration demanded by an absent party who is dissatisfied with the surveyor's valuation, if the surveyor's valuation is upheld, all the costs are borne by such

(*v*) *Ray v. Walker*, (1892) 2 Q. B. 88.
 (*w*) 8 & 9 Vict. c. 18, s. 132.

(*x*) 8 & 9 Vict. c. 18, s. 34.
 (*y*) Sect. 51.
 (*z*) Sect. 62.

party ; but if more is awarded than the valuation, the costs are borne by the promoters (*a*).

- (4.) In all cases of moneys deposited in the Bank, except when such moneys have been deposited by reason of the *wilful* (*i.e.* capricious) refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the wilful neglect of any party to make out a good title to the land required, the costs are borne by the promoters (*b*).
- (5.) The costs of conveyances of lands purchased under the provisions of the Lands Clauses Act or special Act, are borne by the promoters (*c*).

(*a*) Sect. 67.

(*b*) Sect. 80.

(*c*) Sect. 82.

PART III.
OF THE VENDOR'S TITLE.

CHAPTER IX.
ABSTRACT OF TITLE.

SECTION 1.

Registered Land.

THE primary consideration with reference to the sale or purchase of an estate should be the title of the proposed vendor, and before entering into a contract for sale the state of the title of the person about to sell should be ascertained by him, in order that he may protect himself by inserting in the contract such special stipulations as the nature of his title and the evidence thereof in his possession may render necessary to preclude a purchaser from calling for such a deduction of title as a mere open contract would otherwise entitle him to insist upon.

Under the Land Transfer Acts, 1875 and 1897 (*a*), the title to land may be registered either as an Absolute Title, a Qualified Title, or a Possessory Title.

In the case of an Absolute Title the only abstract that

(*a*) 38 & 39 Vict. c. 87 ; 60 & 61 Vict. c. 65.

the purchaser can require is (1) a copy of the Land Certificate, or office copies of the entries on the register and registered plan; (2) copies or abstracts of documents expressly referred to therein; and (3) a statutory declaration as to the existence of matters which are declared by sect. 18 of the Land Transfer Act, 1875, not to be incumbrances (*b*).

In the case of a Qualified Title, the purchaser is also entitled to an abstract of all estates and interests excluded from the effect of registration (*c*). Absolute and Qualified Titles are at present but seldom registered, owing to the trouble and expense involved (*d*), and are practically unknown outside the county of London.

Where only a Possessory Title has been registered, it is conceived that the purchaser is entitled to the same abstract as in the case of unregistered land, that is to say, to a forty years' title prior to the sale, unless he is precluded by an express condition in the contract. .

SECTION 2.

Form of Abstract.

The abstract of title is usually written on brief paper with three inner margins. The outer margin should be left clear for the person investigating the title to insert any note or intended inquiry which may suggest itself as the perusal of the abstract advances—though it is sometimes necessary for the person preparing it to resort to the outer margin in order to insert a note or statement

(*b*) See 60 & 61 Vict. c. 65, s. 16;

Brickdale & Sheldon, p. 70.

(*c*) *Brickdale & Sheldon*, p. 32.

(*d*) It is believed that only about

half-a-dozen Absolute Titles are on
the register.

necessary for properly placing the title upon the abstract.

The abstract should commence with a heading written from the third margin, stating the name of the person whose title is proposed to be deduced, the tenure and situation of the property ; and should the interest of such person consist of an undivided share or shares only in the estate, this circumstance should appear.

It frequently happens that an estate which has been held as one property by successive owners, was originally purchased in several distinct portions at different periods under various titles, which, upon a sale of the entire estate, require to be disclosed. In such a case it will be found very convenient to prepare a distinct abstract in respect of each portion of the property so purchased, continuing such abstract down to the time such portion became dealt with as a part of the general estate, and confining the title to the general estate to one abstract.

Occasionally the title is rendered more complicated by the owner of the estate, or his predecessors in title, after having acquired portions of it, dealing with such portions in a manner differing from those subsequently acquired. In such a case it will be found convenient, where the length of title to each part will permit, to prepare one abstract embracing the titles thus separately dealt with, keeping each separate title distinct, and then follow it up with the general dealings with this particular portion of the estate down to the time when such estate was dealt with as a whole.

Where the titles to several properties are put upon one abstract, care should be taken to keep each title distinct ; and it should be shown by proper headings throughout the

abstract to what estate, or what particular portion thereof, the title is from time to time being deduced, thus :—"As to the estate known as—," or "As to the hereditaments situate at —." Where the estate has become vested in tenants in common, or other part owners, their titles should be kept distinct, and should be denoted by headings, thus :—"As to the one-fourth share of G. H." or as the case may be. And when the entire property has become subject to a general title, the subsequent dealings therewith should be placed under a heading, stating that what follows relates to the entire estate.

The documents should be abstracted in order of date. All facts and circumstances material to the title, such as deaths without issue, intestacies, &c., being noticed as they occur in like order.

It is usual to give the descriptions and additions of the parties to the documents, and the character in which they are parties, such as heir-at-law, personal representative, or otherwise, when they are so described—a very frequent addition in ancient deeds, though rarely met with in modern ones. It is usual for this portion of the abstract to be written from the outer margin.

Recitals are almost invariably written from the first inner margin, and should be given in the past tense, but in other respects *verbatim*, and should be confined to those affecting the title proposed to be deduced.

The abstract of the testatum is usually written from the outer margin. The consideration should be mentioned, and by and to whom paid. The acknowledgment of the receipt should also be stated. The leading operative words, such as "grant and convey," in a conveyance;

"release," in an indenture of release; "exchange," in a deed of exchange; and "assign," in an assignment, should be mentioned, but it is usual to omit the accompanying operative words, as also those in the past tense, generally met with in old deeds. In conveyances by lease and release, when the lease is referred to in the release, reference should also be made to it in the abstract. In statutory deeds executed in pursuance of the Conveyancing and Law of Property Act, 1881, the character in which the parties execute should also be stated, whether as beneficial owner, mortgagee, or the like.

The parcels are invariably set out from the third inner margin, and should be described *verbatim* from the firstly abstracted document containing them, with all exceptions and reservations; a mere statement of the existence of the clauses as to all the estate and all deeds will suffice. The parcels in a subsequently abstracted document, when they are precisely similar to those in a document previously abstracted, should be described by reference to such previously abstracted document, as "The before-mentioned premises, by the description thereof contained in the abstracted indenture of the — day of —."

The habendum, which is frequently written from the second inner margin, with the words limiting the use, should be fully set out. Where the estate is limited to uses to bar dower by the abstracting deed, such uses should be set out, and not a mere statement made that the estate is limited to the usual uses to bar dower.

Trusts by way of limitation of the estate must be abstracted in the same manner as limitations of the use,

and powers acted upon or intended to be exercised should also be fully abstracted; so also should all provisoos for cesser of terms of years.

Powers, provisoos, and declarations are frequently written from the outer margin.

Covenants for title should be shortly stated, care being taken to mention any exception which may occur therein.

In the preparation of the abstract, care should also be taken, as far as possible, to anticipate the scrutiny the deeds will undergo when they are produced for comparison with the abstract, and with this view the names of the parties who have executed and signed receipts for consideration money should be mentioned, and any endorsements on such deeds referred to. It is not, however, usual in practice for the person preparing the abstract to mention thereon the stamp duties impressed upon the abstracted documents.

SECTION 3.

Contents of Abstract.

What Title to be shown.—A contract for sale of real estate implies an agreement to make a good title to the property sold, and a vendor of freehold or copyhold property was formerly bound to deduce a title for a period of sixty years preceding the day of sale (*b*); but now the Vendor and Purchaser Act, 1874 (*c*), provides that, on the completion of any contract of sale of land made after the 31st December, 1874, subject to any

. (*b*) *Cooper v. Emery*, 1 Phil. 388. (*c*) 37 & 38 Vict. c. 78.

stipulation to the contrary in the contract, forty years (*d*) shall be substituted for sixty years, though an earlier title than forty years may be required in cases similar to those in which an earlier title than sixty years might, prior to the time named for the commencement of the Act, have been called for (*e*). By the Interpretation Act, 1889, "land includes messuages, tenements, and hereditaments, houses, and buildings of any tenure." No definition of land is to be found in the Vendor and Purchaser Act, but the word probably does not extend to incorporeal hereditaments.

Root of Title.—When it is said that a forty years' title must be deduced, it must be understood that the abstract must, if necessary, go back further in order to arrive at a point at which the title can properly commence. It must commence *at or before* the forty years with something which is of itself, or which it is agreed shall be, a proper *root of title* (*f*). The best root of title is a mortgage or purchase deed, as such a document leads to the inference that, at the time of the execution thereof, the title must have been investigated, and in the case of a purchase deed the seisin of the predecessor in title is shown. The following instruments are not proper roots of title, viz., a devise by will, an appointment under a power, and a disentailing deed.

In the case of such instruments, the purchaser was formerly entitled to have the title carried back to the *creation of the estate*. This right is now negatived by

(*d*) As to land registered with an absolute title, see *supra*, p. 108. (*f*) *Cox and Neve's Contract*, (1891) 2 Ch. 118.

(*e*) *Ib. s. 1.*

sect. 3, sub-sect. 3, of the Conveyancing Act, 1881 (*g*), but, nevertheless, such documents are not eligible roots of title, and the purchaser should make inquiries *aliunde*.

A voluntary settlement may, in some cases, be a proper root of title, but, as a rule, it is not desirable (*h*).

Prior to the Vendor and Purchaser Act, 1874, if the vendor's interest consisted of a term created within a period of sixty years preceding the date of the contract, the title of the lessor had to be carried back to such a period as, with the title to the term from its creation, would make up a period of sixty years, unless, indeed, the lease were granted by an ecclesiastical corporation (*i*); but now it is provided (*j*), that under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate (subject to any stipulation to the contrary in the contract), the intended lessee or assign shall not be entitled to call for the title to the freehold.

This enactment, though it prohibited an intended lessee or assignee from calling for the title to the freehold, did not impose a like prohibition in case the interest dealt with was derived under an underlease, and there was consequently a superior leasehold title, but in such a case the title of the sub-lessor could be required, and, if it were of sufficient duration, carried back for a period of forty years, but, as it is assumed, not earlier; but now the Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. 1,

(*g*) 44 & 45 Vict. c. 41.

(*i*) *Fane v. Spencer*, 2 Mer.

(*h*) *Noyes v. Patterson*, (1894) 3

430.

Ch. 267; Dart, V. & P. 339. And
see *infra*, at p. 314.

(*j*) 37 & 38 Vict. c. 78, s. 2,
rule 1.

provides, that under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

The period for deducing the title to an advowson is unaffected by the Vendor and Purchaser Act, 1874, and the title must be carried back at least one hundred years, and a list of the presentations during that period should accompany the abstract (*k*). The title to a reversionary interest should be deduced from a sufficiently remote period to show its creation, and it must be shown that the estate has been enjoyed in accordance with the terms of the instrument creating it (*l*).

What Documents to be Abstracted.—Having selected the root of title, every document that forms a link in the vendor's title ought to be abstracted *in chief* (*m*); all circumstances affecting the title should be stated, and all incumbrances effected thereon shown, whether such incumbrances have been discharged or not (*n*).

It is the duty of the vendor to furnish a perfect abstract *at his own expense*, even although the title-deeds are not in his possession. Sub-sect. 6 of sect. 3 of the Conveyancing Act (which at first sight seems to throw the expense on the purchaser) presupposes that the vendor has furnished a proper abstract of title, and only refers to "those incidental circumstances which sometimes arise in the course of the investigation of the abstract" (*o*).

(*k*) Dart, V. & P. p. 334; 3 & 4 Will. 4, c. 27, s. 30.

(*l*) 1 Jarm. Conv. 61.

(*m*) *Ebsworth and Tidy's Contract*, 42 C. D. 34. *Re Stamford Banking*

Co. & Knight, (1900) 1 Ch. 287.

(*n*) *Heath v. Crealock*, 10 Ch. 22;

Drummond v. Tracy, Johns. 608.

(*o*) *In re Johnson and Tustin*, 30 C. D. 42.

The fraudulent concealment by the seller or his solicitor or agent of any settlement, incumbrance or other instrument material to the title, is, by statute, made a misdemeanour (*p*); but where a document of a date anterior to the commencement of the title was recited in a document abstracted, and the recited document was not in the vendor's possession, and there were no suspicious circumstances connected with its absence, its non-production could not be made a valid objection to the title (*q*); and now the right to the production of such a document is expressly negatived by sect. 3, sub-sect. 3, of the Conveyancing and Law of Property Act, 1881. Judgments, Crown debts, annuities, and *lis pendens*, should, speaking strictly, be mentioned in the abstract, though this is scarcely ever done in practice.

Where property sold has been taken in exchange since the General Inclosure Act, 1845 (*r*), under an order of exchange, the title to the land given in exchange becomes transferred to the land taken in exchange, and the purchaser is, therefore, in such a case entitled to have the title to the land given in exchange deduced to the date of the exchange, and subsequently to the land taken in exchange (*s*); but where the estate is taken under an exchange at common law, or by mutual conveyances, the abstract must to the time of the exchange show the title to the estate taken in exchange, as also to that given in exchange for it (*t*), unless, in the case of a common law

(*p*) 22 & 23 Vict. c. 35, s. 24, and
23 & 24 Vict. c. 38, s. 8.

(*q*) *Prosser v. Watts*, 6 Mad. 59.

(*r*) 8 & 9 Vict. c. 118, s. 147.

(*s*) *Minet v. Leman*, 24 L. J. Ch. 548.

(*t*) *Bastard's case*, 4 Rep. 121;
Sugd. V. & P. 372.

exchange, the estate given in exchange has since been sold (*u*).

It is generally considered that where the property has been allotted under an Inclosure Act, the abstract down to the award must deduce the title to the lands in respect to which the allotment was made, and should the allotment have been made in respect of lands held under different titles, all of them must be deduced (*v*).

This view would appear to be correct since the Commissioners have no jurisdiction to determine title (*w*).

Where, however, a very considerable time has elapsed since the award was made, the Court will presume that it was valid (*x*).

Where land has been exonerated from tithe by an exchange under 6 & 7 Will. IV. c. 71, sect. 30, the title to the land given in exchange for the tithe must be shown (*y*).

A tenant in common purchasing of a co-tenant is entitled to an abstract of the general title (*z*).

When the property sold consists of renewable leaseholds, if the subsisting lease be expressed to be granted in consideration of the surrender of a prior one, it should be shown that the party surrendering was the equitable as well as the legal owner of the lease surrendered.

(*u*) *Jarm. Con.* by S. 75; but see 8 & 9 Vict. c. 106, s. 4.

(*v*) *Cattell v. Corrall*, 4 Y. & C. 228; and see 8 & 9 Vict. c. 118, s. 93.

(*w*) 8 & 9 Vict. c. 118, s. 49. The word "conclusive" in s. 105 means conclusive except as to title, see *Jacomb v. Turner*, (1892) 1 Q. B. 50.

(*x*) *Phillips v. Maile*, 7 Bing. 147; *Bateman v. Boynton*, 1 Ch. 359; *Micklethwaite v. Vincent*, 69 L. T. N. S. 57.

(*y*) *Dart*, V. & P. 329.

(*z*) *Morris v. Kearsley*, 2 Y. & C. 139. As to the rule in case of a partner purchasing his co-partner's share of partnership leaseholds, see *Law v. Law*, 9 Jur. 745.

If the lease be held for lives, evidence must be given of the existence and correct ages of the *cestuis que vie*, even though there should be a covenant for perpetual renewal (*a*).

Where a term which has been in existence for more than forty years is sold, the abstract should show the creation of the term and a forty years' title to the possession thereof, omitting the intermediate period (*b*) ; but where the contract did not contain a provision protecting the vendor against production of deeds not in his possession, he was held to be bound to produce the lease which was the root of title (*c*).

The same rule prevails in the case of satisfied terms, which have become merged under the provisions of 8 & 9 Vict. c. 112 ; and the intermediate assignments from the commencement of the title to the inheritance should be taken down to the date of merger. It is almost needless to say that the abstract of such assignments need be but very short, and indeed it is frequently omitted in practice.

Upon the sale of property held under grant from the Crown (such as tithes, for instance, held as a lay property), the title must commence with the original grant from the Crown ; and it has been held that the title following such grant may commence at the same period as the title to the estate out of which the tithes issue would have done (*d*). Though the tithes may have been merged under the Acts

(*a*) *Anderson v. Higgins*, 1 J. & L. 718.

(*b*) *Williams v. Spargo*, W. N. (1893) 100.

(*c*) *Frend v. Buckley*, L. R., 5 Q. B. 218.

(*d*) *Pickering v. Lord Sherborne*, 1 Craw. & Dix, Abr. 254.

of 6 & 7 Will. IV. c. 71, and 1 Vict. c. 64, should the estate be sold as tithe free, the earlier title must be produced (*e*).

Upon a sale of copyholds the title as it appears upon the Court rolls should be deduced, as also the equitable title.

Where the sale is of enfranchised copyholds the purchaser has not got the right to call for the title of the lord of the manor to make the enfranchisement (*f*).

Articles for a settlement before marriage, in pursuance whereof settlements have been made after marriage, should be abstracted, in order that it may be seen that the articles were duly carried into effect (*g*).

SECTION 4.

Abstract, when considered perfect.

An abstract will be considered perfect when it appears therefrom that the vendor can himself convey or procure a conveyance of the legal and equitable estate, free from incumbrances, to be made to the purchaser (*h*). The title also will be considered perfect when it appears that the vendor will be in a position at the time fixed for completion to acquire an indisputable right to the legal and equitable estates (*i*).

(*e*) Sugd. V. & P. 367.

Ves. 436.

(*f*) C. A. 1881, s. 3, sub-s. 2.

(*i*) *Cattell v. Corrall*, 4 Y. & C.

(*g*) Prid. Con. tit. Abstract.

228.

(*h*) *Lord Braybrook v. Inskip*, 8

The abstract will be considered imperfect if the concurrence of incumbrancers, or of any third person whose consent is necessary, cannot be insisted on (*j*).

The abstract when delivered will become the property of the purchaser on the purchase being completed; and he will be entitled to retain it until the purchase is vacated by consent, or is declared impracticable by a Court of Equity (*k*), in which case the abstract is to be returned, and no copy kept by the purchaser, lest it be kept for a mischievous purpose; and although the purchaser pays for the opinion, that ought, it should seem, for the same reason, to be returned with the abstract (*l*).

The Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. 7, provides that on a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title shall not have a right to more than one abstract of the common title except at his own expense.

(j) *Lewin v. Guest*, 1 Russ. 325; *Sidebotham v. Barrington*, 3 Beav. 524.
 (k) *Roberts v. Wyatt*, 2 Taunt. 268.
 (l) Suggd. V. & P. 11th ed. 447.

CHAPTER X.

INCIDENTS OF TITLE.

HAVING endeavoured to show the nature of the title which the purchaser may call for, we will proceed to consider the various incidents of title which suggest themselves on the investigation being entered upon.

SECTION 1.

Descent on Intestacy

The Rules of Descent.—In the case of deaths intestate since the 1st January, 1898, realty as well as personality is vested in the administrator so soon as letters of administration are taken out (*a*). Prior to the grant, the legal estate is probably in the heir-at-law (*b*), but a good title cannot be made by the heir until administration has been taken out and the estate has been conveyed to him by the administrator under sect. 3 of the Land Transfer Act. This, however, does not affect the beneficial interest in the property which is regulated by the law of Inheritance Act, 1833 (*c*).

The rules of descent as to an estate in fee simple are as follows:—

Rule 1. Inheritances shall lineally descend to the issue of the last purchaser *in infinitum*, who is defined by the

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| <p>(<i>a</i>) Land Transfer Act, 1897, 60
& 61 Vict. c. 65, s. 1.</p> <p>(<i>b</i>) <i>John v. John</i>, (1898) 2 Ch.</p> | <p>576.</p> <p>(<i>c</i>) 3 & 4 Will. IV., c. 106.</p> |
|---|--|

Act to be the last person entitled to the land, unless it shall be proved that he inherited (d).

Rule 2. The male issue shall be admitted before the female.

Rule 3. Where there are two or more males in equal degree the eldest only shall inherit, but females altogether. Consequently, the issue of the eldest male would take, to the exclusion of the younger and his issue, the younger male and his issue taking to the exclusion of the females, who, on the death of the younger male without issue, would take in equal shares as coparceners. If one of two coparceners dies seised and intestate leaving a child, the whole of her share descends upon the child to the exclusion of the other coparcener (e), and this rule applies equally in favour of her more remote lineal descendants (f)

Rule 4. The lineal descendants *in infinitum* of a person deceased shall represent their ancestor.

Rule 5. On failure of issue the inheritance shall descend to the purchaser's nearest lineal ancestor.

Rule 6. The father and all the male paternal ancestors of the purchaser and their descendants shall inherit in preference to any of the descendants of such lineal ancestor and before any of the female paternal ancestors and their heirs; all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors or her or their descendants; and the mother and all the male maternal ancestors and her and their descendants before any of the female maternal ancestors or their heirs.

(d) 3 & 4 Will. IV., c. 106, s. 1. (f) *Re Matson*, (1897) 2 Ch.
(e) *Cooper v. France*, 14 Jur. 214. 509.

Rule 7. A kinsman of the half-blood shall be capable of being heir, and shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman when the common ancestor is a male, and next after the common ancestor when such common ancestor is a female.

Rule 8. The mother of the more remote male paternal ancestor and her heirs shall be preferred to the mother of a less remote male paternal ancestor and her heirs.

Rule 9. By the stat. 22 & 23 Vict. c. 35, sects. 19, 20, it is enacted that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in such case the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof.

Intestates Estates Act.—By the Intestates Estates Act, 1890 (*g*), a slight variation is made in the rules of descent above stated. This Act only applies to the case of a man dying intestate after September 1st, 1890, leaving a widow but *no issue*. If the intestate's estate (real or personal) does not exceed £500, the widow is entitled exclusively; if it does exceed £500, she has a charge for that amount with interest thereon at 4 per cent. from the date of the death of the intestate. “The widow takes the £500 out and out paramount to everything”; and the residue of the real and personal estate devolves in

the usual manner (*h*). The Act does not apply to a case of *partial* intestacy (*i*).

Explanation of Rules of Descent.—From the foregoing it will be gathered, first, that the person last entitled to the inheritance, whether he obtained possession thereof or not, is the party from whom the descent is to be traced, provided he did not inherit. Such person is styled the purchaser, the legal signification of the word “purchase” being defined by Littleton to be—possession to which a man cometh not by descent (*j*); and it may not be out of place to observe here, that a devisee of real estate takes by purchase, even though he may be the heir of the testator (*k*), and the property devised may have come to the testator by descent (*l*).

Secondly, that the inheritance will descend to the issue of such person *in infinitum*, the descendant of a person deceased representing the ancestor, the eldest son and his issue taking before the younger sons and their issue, and the daughters taking in equal shares on failure of the issue of their brothers, as coparceners, the share of each daughter descending to her respective heirs.

On failure of the issue of the purchaser, the inheritance would go to his father, as the nearest lineal ancestor, before the brothers or sisters of the purchaser, who and whose issue would take after the father; the brothers and sisters of the whole blood to the purchaser taking before the brothers and sisters of the half-blood, the latter on the

(*h*) *Re Charriere*, (1896) 1 Ch.

912.

(*i*) *Re Twigg's Estate*, (1892) 1 Ch. 579.

(*j*) Litt. s. 12.

(*k*) 3 & 4 Will. IV., c. 106.

(*l*) 1 Vict. c. 26, s. 1.

father's side taking next after the issue of the whole blood; and on failure of the issue of the father of the purchaser, the inheritance would continue to ascend thus: the grandfather, being the next lineal ancestor of the purchaser, would become entitled in preference to the uncles or aunts or their issue, who would take next after the grandfather of the purchaser, and so on until the male paternal lineal ancestors and their issue were exhausted.

On failure of the male paternal ancestors of the purchaser and their issue, the female paternal ancestors and their issue are next entitled, the mother of a more remote male paternal ancestor and her heirs taking before the mother of a less remote male paternal ancestor; thus the mother of the paternal grandfather and her issue being preferred to the father's mother and her issue.

And on failure of the female paternal ancestors of the purchaser and their issue, the mother of the purchaser and her heirs would become entitled to the inheritance.

Property to which the Rules of Descent do not apply.

In the absence of any local custom, *copyhold* lands are regulated by the ordinary law of inheritance above stated (*m*). But both copyholds and freeholds are subject to particular customs of descent which prevail in certain manors, cities, or districts.

Descent by Local Custom.—Thus, in parts of Kent the custom of *gavelkind* still prevails (*n*). By this custom the

(*m*) Elton on Copyholds, p. 126. unless it is shown to be disgavelled.

(*n*) The presumption in Kent is See Robinson on Gavelkind, 4th that land is of gavelkind tenure, ed., 1897.

descent is to all the sons equally, and in default of sons, to all the daughters equally, and in default of children, to all the brothers equally.

Borough-English is a custom occasionally to be found in lands held by burgage tenure within ancient boroughs, and also in a few manors. By this custom the descent is to the *youngest* son, to the exclusion of the other children.

When there is a special custom as to descent, which is neither Borough-English nor gavelkind, and there is no person to answer literally the description contained in the words of the custom, the estate descends to the common law heir (*o*).

Chattel Interests.—Terms of years and other chattel interests in land descend to the next-of-kin of the intestate in accordance with the rules regulating the descent of personality.

Estates Tail.—The descent of estates tail will be dealt with hereafter (sect. 3).

Estates pur autre vie.—Before concluding the discussion of descent, it is proposed to deal very briefly with the transmission of estates *pur autre vie*. If lands were given to A. for the life of B., then prior to the Statute of Frauds (*p*), on the death of A. during the lifetime of B., the estate went to the first person who took possession, who was known as the *general occupant*. If, however, the estate *pur autre vie* were limited to A. and his heirs, it descended on the death of A. to his heir as *special occupant*. It is to be observed, however, that the heir in such cases took as occupant, and not as deriving

(*o*) *Ite Smart*, 18 C. D. 165.

(*p*) 29 Car. 2, c. 3, s. 12.

title through the original tenant *pur autre vie* (q). The Wills Act (r), which repeals and re-enacts sect. 12 of the Statute of Frauds, provides that an estate *pur autre vie* may be devised. If no devise be made thereof, the estate is chargeable in the hands of the special occupant as assets by descent. In case there is no special occupant, the estate passes to the executors and administrators of the tenant *pur autre vie*, and is treated as personalty (s).

SECTION 2.

Devide.

The Wills Act (t), which came into operation on the 1st of January, 1838, enables every person to devise, bequeath, or dispose by will of all real and personal estate which he shall be entitled to at law or in equity, which would otherwise devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, to the heir of his ancestor, or upon his executor or administrator; and the power thereby given extends to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir or devisee or otherwise to be admitted thereto, he should not have been admitted thereto, or notwithstanding that the same, in consequence of a want of a custom to devise or

(q) *Northern v. Carnegie*, 4 Drew. 487; *In re Barber's Settled Estates*, 18 C. D. 624.

(r) 1 Vict. c. 26, ss. 3 and 6.

(s) *Re Sheppard*, (1897) 2 Ch. 67, *Earl of Mount Cashell v. More Smythe*, (1896) A. C. 158.

(t) 1 Vict. c. 26.

surrender to the use of a will or otherwise, could not at law have been disposed of by will if the Act had not been made; and also to estates *pur autre vie*, whether there should or should not be any special occupant thereof, and whether the same should be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same should be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator might or might not be ascertained as the person or one of the persons in whom the same respectively might have become vested, and whether he might be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator might be entitled at the time of his death, notwithstanding that he might become entitled to the same subsequently to the execution of his will.

Wills of Infants and Married Women.—No will made by an infant is now valid (*u*). In cases to which the Married Women's Property Act, 1882 (*v*), does not apply, a married woman can only dispose of real property by will if it has been settled to her separate use, or if she has a testamentary power of appointment over it. A woman who was married before the 1st January, 1883 (the date at which the above-mentioned Act came into

(*u*) 1 Vict. c. 26, s. 7.

(*v*) 45 & 46 Vict. c. 75.

operation), has full testamentary power over property to which her title, whether vested or contingent, and whether in possession or remainder, has accrued *since that date* (*w*). It must, however, be borne in mind in the case of women who died before the 5th December, 1893, that a will made by a married woman was not effectual to dispose of property which she might acquire after the termination of the coverture (*x*). Now, however, it is enacted by the Married Women's Property Act, 1893 (*y*), that sect. 24 of the Wills Act (by virtue of which a will speaks from the death of the testator) "shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or re-published after the death of her husband."

Lastly, a woman who was married after the 1st January, 1883, has power to dispose by will of all her property, whether the property belonged to her at the time of her marriage, or was subsequently acquired (*z*).

A restraint on anticipation does not prevent a disposition by will (*a*).

Signature and Attestation.—No will shall be valid unless signed at the foot or end thereof by the testator, or by some person in his presence and by his direction, and which signature shall be made or acknowledged by

(*w*) 45 & 46 Vict. c. 75, s. 5 ;
In re Bowen, (1892) 2 Ch. 291.

(*x*) *In re Price*, 28 C. D. 709 ;
In re Wylie, Wylie v. Moffat, (1895) 2 Ch. 116.

(*y*) 56 & 57 Vict. c. 58, s. 3.
(*z*) 45 & 46 Vict. c. 75, s. 2.

(*a*) *Re Currey, Gibson v. Way*, 56 L. T. 80 ; and cf. *Bates v. Kesterton*, (1896) 1 Ch. at p. 163.

the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary (*b*).

It is not necessary that the testator actually sign in the presence of the witnesses, or even in express terms acknowledge the will, and such acknowledgment may be inferred from circumstances (*c*); but the signature or acknowledgment must be in the presence of both the attesting witnesses, both present at the same time before they attest the will (*d*).

Appointments.—No appointment made by will in exercise of a power shall be valid unless the same be executed in manner before required; and every will executed in manner before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other solemnity (*e*); but a power of appointment to be exercised by a writing under the hand and seal of the person exercising it, will not be well exercised by a will, though executed according to the formalities of the Wills Act, if it be not also sealed (*f*). Where the appointment was directed to be made by deed or instrument in writing,

(*b*) 1 Vict. c. 26, s. 9; cf. *Royle v. Harris*, (1895) p. 163; *In the goods of Anstee*, (1893) p. 283; and see also 15 & 16 Vict. c. 24.

(*c*) *Beckett v. Howe*, L. R., 2 P. & M. 1; *In the goods of Huckvale*,

L. R., 1 P. & M. 375; *Inglesant v. Inglesant*, L. R., 3 P. & M. 172.

(*d*) *Wyatt v. Berry*, (1893) P. 5.

(*e*) 1 Vict. c. 26. s. 10.

(*f*) *West v. Ray, Kay*, 392; *Taylor v. Meads*, 84 L. J. Ch. 208.

signed, sealed and delivered by the party executing it, the power was held to be well exercised by the will of the appointor, which was not expressed to be delivered, but stated in the attestation clause to be signed, sealed, published, acknowledged and declared in the presence of the attesting witnesses (*g*) ; but a power of appointment by writing under hand or by will is not well exercised by a testamentary instrument unattested (*h*) ; and every will executed in manner before required is to be valid without further publication thereof (*i*).

Wills of Foreigners.—Chattels real, as well as real estate, are *immobilia*, and are therefore governed by the *lex loci rei sitae*, and not by the *lex domicili*. Whatever the domicile or nationality of the testator, a will is valid, so far as real or leasehold estate in this country is concerned, provided that it is in accordance with the formalities required by the Wills Act (*j*). On the other hand, although a will executed by a person domiciled in a foreign country according to the law of that country is admitted to probate in England, and is a valid execution of a testamentary power of appointment (whether general or special) over personal estate, such a will is ineffectual with regard to real estate or chattels real in this country, unless it complies with the requirements of the Wills Act (*k*). Lord Kingsdown's Act (*l*), which deals with the wills of British subjects domiciled abroad,

(*g*) *Smith v. Adkins*, L. R., 14 Eq. 402.

(*h*) *Re Daly's Settlement*, 25 Beav. 456.

(*i*) 1 Vict. c. 26, s. 13.

(*j*) Dicey's Conflict of Laws, p. 523.

(*k*) *Pepin v. Bruyere*, (1900) 2 Ch. 504.

(*l*) 24 & 25 Vict. c. 114.

does not affect real estate or chattels real (*m*) and need only be referred to in passing.

Attesting Witnesses.—The Wills Act provides that a devise or bequest to a person attesting the execution of a will or to his or her *husband or wife* shall be void, but such person shall be admitted as a witness (*n*). If, however, the will is republished by a codicil referring to it, the devise in the will is good, unless the devisee also attests the codicil (*o*). { Creditors are also good witnesses, though the will contains a charge for payment of debts (*p*); and the fact that he is appointed executor is not an objection to a witness (*q*); and the gift to a class as joint tenants, one of which is a witness, will not sever the joint tenancy, but the whole will go to the other members to the exclusion of the witness (*r*).

Revocation of a Will.—A will is revoked by the marriage of the testator (*s*), except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions. A will may also be revoked by writing executed in the same manner as a will, and declaring an intention to revoke, or by burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence by his direction, with the intention of revoking the same (*t*).

(*m*) See Dicey, p. 691.

(*q*) *Ib.* s. 17.

(*n*) 1 Vict. c. 26, s. 15.

(*r*) *Young v. Davies*, 2 Drew. &

(*o*) *Anderson v. Anderson*, 13 Eq.

Sm. 167.

181.

(*s*) 1 Vict. c. 26, s. 18.

(*p*) 1 Vict. c. 26, s. 16.

(*t*) *Ib.* s. 20.

No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (*u*) ; the provision, however, in the Wills Act does not affect the equitable rule treating property agreed to be sold as personalty (*v*), even though the devise be to a trustee upon trust for sale (*w*).

Will speaks from the Death.—Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if executed immediately before the testator's death, unless a contrary intention shall appear by the will (*x*). This section has been the subject of many decisions. Thus, a devise of all the lands whereof I am now seised has been held not to pass an estate acquired after the execution of the will (*y*) ; but if the testator makes a codicil confirming the will subsequent to the acquisition of the estate, the estate will pass by the devise (*z*). The devise also of a house in which "A. now resides, with the appurtenances," was held to pass a piece of land subsequently purchased and attached to the house (*a*) ; and a devise of all the

(*u*) 1 Vict. c. 26, s. 23.

and cf. *Portal v. Lamb*, 30 C. D.

(*v*) *Farrar v. Earl Winterton*, 5

Beav. 1.

50. (*z*) *In re Champion*, (1893) 1 Ch.

(*w*) *Gale v. Gale*, 21 Beav.

101.

349.

(*a*) *Re The Otley and Ilkley Rail.*

(*x*) 1 Vict. c. 26, s. 24.

Co., 11 Jur. N. S. 808.

(*y*) *Cole v. Scott*, 1 M. & G. 518;

lands in a particular place has also been held to pass lands in that place subsequently acquired (*b*). It may now be taken as settled, that if a will contains a description of any kind of property, such a description must be held to include and apply to whatever property the testator has at the time of his death which answers to the description, unless a contrary intention appears by the will (*c*). It is, however, doubtful whether sect. 24 applies to the exercise by will of a special power of appointment (*d*).

Die without Issue.—By sect. 29 of the Wills Act it is enacted that in a devise the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an *indefinite failure of issue*, shall be construed to mean a want or failure of issue *in the lifetime or at the death of such person*, and not an indefinite failure of such issue. This section does not affect the question whether the executory limitation over is to be construed as taking effect in the event of the testator leaving no issue at his death, or in the event of his having had no issue during his lifetime. If the gift over is on death without children, the word "children" is usually construed as synonymous with "issue," but a devise of this kind does not give the children any interest by implication (*e*). Sect. 29 of the Wills Act must be

(*b*) *Lord Lilford v. Keek*, 30 Beav. 300.

(*c*) *In Re Bridger*, (1894) 1 Ch. 299.

(*d*) *Re Wells' Trusts*, 42 C. D. 657.

(*e*) *Scalé v. Rawlins*, (1892) A. C. 842.

read in connection with sect. 10 of the Conveyancing Act, 1882, which provides that a limitation over of this character in an instrument coming into operation after the 31st December, 1882, shall be defeated if and as soon as there is living any issue who has attained the age of twenty-one years of the class on default, or failure whereof the limitation over was to take effect. Thus, in the case of a devise to A. in fee, but in the event of his dying without issue over to B., if A. has a child who attains twenty-one, the estate of A. in the property becomes absolute and indefeasible.

Lapse.—Unless a *contrary intention* (*f*) appear by the will, real estate comprised in a devise which shall fail by reason of the death of the devisee in the lifetime of the testator, or be otherwise incapable of taking effect, shall be included in the residuary devise (if any) in the will (*g*). There are, however, two exceptions to this rule, viz. (1) where the devise is for an estate tail, in which case, if the devisee die in the lifetime of the testator leaving issue who would inherit under such entail, and any of such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*h*); and (2) if the devisee, being a child or other issue of the testator, die in his lifetime leaving issue, any of whom are living at the testator's death (unless a life estate only has been given to the

(*f*) As to contrary intention,
see *Re Bagot*, (1893) 3 Ch. 348.

(*g*) 1 Vict. c. 26, s. 25.
(*h*) *Ib.* s. 32.

devisee), the devise shall take effect as mentioned in the former case (*i*); but this exception (sect. 33) does not apply to a devise to children *as a class*, which will take effect in favour of the survivors in the event of either of the members of such class dying before the testator (*j*) nor does it apply to the exercise of a special power of appointment (*k*).

General Devise.—A general devise of real estate or a bequest of personalty will be construed to include in such devise or bequest any real or personal estate (to which the description contained in such bequest will extend) which the testator may have power to appoint in any manner he may think proper (*l*); and it has been held that a general power of appointment given to the survivor of several persons has been well exercised by a residuary devise in the will of the survivor, executed during the joint lives of such survivor and another of the persons to whom the power was limited who predeceased (*m*). A gift of residue has also been held to pass not only property over which a testator had a power of appointment at the time of making his will, but also property over which he acquired a general power after the date of his will (*n*). This section of the Wills Act (27) does not apply to a special power of appointment. A *special*, i.e., a limited power of appointment, is not exercised unless there is a reference to the power, or to property subject

(*i*) 1 Vict. c. 26, s. 33.

(*l*) 1 Vict. c. 26, s. 27.

(*j*) *Browne v. Hammond*, Johns, 210; *In re Harvey's Estate*, (1893)

(*m*) *Thomas v. Jones*, 2 J. & H. 475.

1 Ch. 567.

(*n*) *Stillman v. Weedon*, 16 Sim.

(*k*) *Holyland v. Lewin*, 26 C. D. 266.

26, but as to a special power, see *Re Hayes*, (1900) 2 Ch. 382.

to the power, or some other clear indication of an intention to exercise it in the will (*o*).

Trust and Mortgage Estates.—A general devise formerly included the trust and mortgage estates of the testator, unless there was a contrary intention in the will, *e.g.*, a charge of debts and legacies (*p*), and still includes trust and mortgage estates of copyholds where the trustee or mortgagee has been admitted (*q*). But since the Conveyancing Act, 1881 (*r*), trust and mortgage estates in freehold property devolve and become vested in the legal personal representatives of the trustee or mortgagee, notwithstanding any testamentary disposition to the contrary. Where real estate is devised without words of limitation, such devise will be construed to pass the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention appears (*s*).

Devise to Trustees.—The estate taken by trustees under a devise to them in a will is regulated by sects. 30 and 31 of the Wills Act. The construction of these sections presents considerable difficulty, and it is believed that they were originally drafted as alternative provisions (*t*). The general rule is that the trustees take the whole fee simple (1) where there is a clear intention to vest it in them as

(*o*) *Von Brockdorff v. Malcolm*, 30 C. D. 172, at p. 179; *In re Wait, Workman v. Petgrave*, 30 C. D. 617. A power to appoint by deed or will may be released by the donee in his lifetime, *Re Radcliffe*, (1892) 1 Ch. 231; and so also may a power to appoint by will only, *Lyons v. Carroll*, (1896) 1 I. R. 393. See also Conveyancing Act, 1881, s. 52; *Re*

Chisholm, W.N., (1900) 128.
(*p*) *Re Bellis' Trusts*, 5 C. D. 504.
(*q*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 88; *Re Mills*, 37 C. D. 312.
(*r*) 44 & 45 Vict. c. 41, s. 30.
(*s*) 1 Vict. c. 26, s. 28.
(*t*) See Underhill on Trusts, pp. 224-242.

e.g., a devise unto and *to the use* of the trustees and their heirs, and (2) where a fee simple is required in order to carry out the trusts of the will, e.g., a trust to sell, lease, or mortgage, or to do, or perform any other act which requires complete control of the property.

In other cases the trustees take only such estate as will enable them to perform the trusts confided to them, e.g., an estate *pur autre vie* during the life of the tenant for life, or an estate in remainder after his decease. Thus a trust to pay the rents and profits to A. during his life gives the legal estate to the trustees during the life of A.; but a trust to permit and suffer A. to receive and take the rents and profits gives A. a legal life estate (*u*). If the trust is to pay or permit and suffer A. to receive and take the rents and profits, the last expression prevails, and unless there is some context to the contrary, A. takes the legal estate during his life (*v*). An ultimate trust *to convey* the estate to B. after the death of A., gives the trustees a legal estate in remainder, even although A. took the legal estate during his life (*w*). On the other hand, if the ultimate trust is for B. absolutely (with no mention of conveyance), the trustees have no further duty to perform, and the legal estate on the death of A. vests in B. (*x*). It is, however, a convenient rule which has recently been established by the decision of the House of Lords in *Foxwell v. Van Grutten* (*y*), that "where there are recurring occasions for the exercise of active duties by the trustees, and no repeated

(*u*) See Underhill on Trusts, p. 228.

(*w*) *Doe v. Bolton*, 11 Ad. & E. 188.

(*v*) *Doe v. Biggs*, 2 Taunt. 109; *Adam and Perry's Contract*, 1899, 1 Ch. 561.

(*x*) *Re Lashmar*, (1891) 1 Ch. 258.

(*y*) 1897, A. C. 658.

devises to them to enable them to perform their duties, the legal estate if once in the trustees is to be deemed to be vested in them throughout, notwithstanding the direction in the meantime of what would, but for the recurring duties, be construed as uses executed in the beneficiaries."

Assent of Executors.—It should of course be borne in mind that in case of death after the 31st December, 1897, the legal estate does not vest in the trustees or beneficial devisee as the case may be, until the executors have assented to the devise (z).

SECTION 3.

Entail.

Nature of Estates Tail.—The rule against perpetuities prevents the destination of an estate from being restricted for a longer period than a life or lives in being and twenty-one years afterwards, and also the period allowed for gestation if existing (a). If, however, the restriction on alienation is effected by limiting the estate to a living person for life, making the unborn children of such person tenants in tail, the rule does not apply ; and such an estate, if left to itself, will devolve in a regular course of descent as long as the posterity of the tenant in tail continues.

The course of descent, however, seldom remains undisturbed for any length of time ; the tenant in tail usually

(z) 60 & 61 Vict. c. 65, ss. 1 and 3. mainders, 490 ; *Cadell v. Palmer*,

(a) *Feerne on Contingent Re-* 7 Bligh, N.S. 202.

on the death of the tenant for life, if not before, availing himself of the power he possesses of placing the estate under his immediate control.

Entail, how formerly barred.—This object was, previously to the Act for the Abolition of Fines and Recoveries (*b*), attained by means of suffering a recovery or levying a

A recovery not only barred the issue of the tenant in tail, but also the persons entitled in reversion or remainder expectant on the determination of the estate tail; but it was necessary in the case of a recovery to obtain the concurrence of the immediate tenant of the freehold.

A fine, however, might be levied without such consent, and it would effectually bar the right of the issue of the tenant in tail, but on failure of such issue the reversioner or remainderman would become entitled, as their rights were not defeated by this species of assurance. The estate thus created was called a base fee.

How now barred.—Both fines and recoveries were abolished in the year 1833. By the Act known as the Fines and Recoveries Act, 1833, a tenant in tail in possession is enabled to bar the entail by deed enrolled in the central office of the Supreme Court (*c*), within six months after its execution. Unless, however, a tenant in tail has barred the entail in his lifetime, he cannot devise the property by his will.

An estate tail granted by the Crown as the reward of public services cannot be barred. When there is a limitation *in tail special*, e.g., to A. and the heirs of his body

(*b*) 3 & 4 Will. IV., c. 74.

(*c*) R. S. C., Ord. LXI. r. 9.

begotten by him on a particular wife, and the wife dies childless, the husband is known as a "tenant in tail after possibility of issue extinct." The Act prohibits such a tenant in tail from barring the entail (*d*).

A disposition by a tenant in tail by way of mortgage, or for any other limited purpose, if duly enrolled, is an absolute bar to the extent of the estate created against all persons who under the Act can be barred, notwithstanding any intention to the contrary which may be expressed or implied in the deed (*e*).

Office of Protector.—The Act abolishing fines and recoveries has introduced the office of *protector*, which generally exists during the continuance of those estates which may precede an estate tail.

If at the time when there shall be a tenant in tail under a settlement, there shall be under the same settlement any estate for years determinable on a life, or any greater estate (not being an estate for years), prior to the estate tail, then the owner of the prior estate or the first of such prior estates if more than one subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement, and shall, for the purposes of the Act, be deemed the owner of such prior estate, although the same may have been charged or encumbered, and although all the rents be exhausted or required for the payment of the incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner, or by his bankruptcy or insolvency, or by

(*d*) 3 & 4 Will. IV., c. 74, s. 18.

(*e*) *Ib.* s. 21.

As to these cases, see *supra*, p. 86.

any other act or default of such owner. An estate by the courtesy in respect of such estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate, and a resulting use or trust to or for the settlor is to be deemed an estate under the same settlement (*f*).

The Act also provides for making each owner of an undivided share the protector of such share (*g*) ; so that if there are two tenants in tail, each may alone acquire the fee in his moiety by virtue of the statute (*h*) ; and the husband and wife are made protectors where the wife, if single, would have been the protector in respect of a prior estate, unless settled to her separate use, in which case she alone is to be the protector (*i*) ; but where an estate is limited by a settlement by way of confirmation, or where the settlement merely has the effect of restoring the estate, such estate is, so far as regards the protector of the settlement, to be deemed an estate subsisting under such settlement (*j*). But a lease at a rent created or confirmed by a settlement shall not make the owner of it the protector (*k*), nor shall a woman in respect of dower (*l*) ; or a bare trustee, executor, administrator or assign be the protector ; but where there is more than one estate prior to an estate tail, and the owner of any such prior estate is excluded by sects. 26 and 27 from being protector, the person, who, if such estate did not exist, would be protector, will be such protector (*m*).

(*f*) 3 & 4 Will. IV., c. 74, s. 22.

(*j*) 3 & 4 Will. IV., c. 74, n. 25.

(*g*) *Ib.* s. 28.

(*k*) *Ib.* s. 26.

(*h*) *Church v. Edwards*, 2 Bro.

(*l*) *Ib.* s. 27.

C. C. 180.

(*m*) *Ib.* s. 28.

(*i*) 3 & 4 Will. IV., c. 7, s. 24.

A settlor entailing lands is empowered to appoint any person or number of persons, not exceeding three, to be protector in lieu of the person who would have been the protector if there had been no such appointment (*n*).

Should the protector be a lunatic, the lord chancellor or other person for the time being entrusted with the care of lunatics, will be the protector in the place of such lunatic (*o*).

Base Fee.—The effect of a disentailing deed duly enrolled, to which the protector is not a party, is to create a base fee (*p*).

If a tenant in tail makes an assurance to a third party without the consent of the protector, he may subsequently enlarge the base fee so created into a fee simple, under sect. 19 of the Act, either after the protector's death or during his lifetime, with his consent (*q*).

Moreover, a base fee, conveyed to a third party who enters into possession of the property, is enlarged into a fee simple by the lapse of twelve years from the death of the protector (*r*). On the other hand, a conveyance in fee by a tenant in tail, otherwise than by deed enrolled, creates a *quasi base fee* subject to be defeated by the entry of the issue in tail. It has the same effect as if the tenant in tail had merely granted away his life estate, and consequently the estate of the grantee is not enlarged into a fee simple by his possession until twelve years *after the death of the grantor* (*s*).

(*n*) 3 & 4 Will. IV., c. 74, s. 32. 716; and see *Re Drummond and*

(*o*) *Ib.* s. 33.

Davie, (1891) 1 Ch. 524.

(*p*) *Ib.* s. 34.

(*r*) 37 & 38 Vict. c. 57, s. 6.

(*q*) *Bankes v. Small*, 36 C. D.

(*s*) *Morgan v. Morgan*, 10 Eq. 99.

Where the tenant in tail in possession has not conveyed away his rights, as in the last-mentioned case, but has allowed a trespasser to remain in possession of the property, the rights of the issue and remainderman are barred after twelve years from the time such possession is taken (*t*).

Married Women.—A married woman, who is protector of a settlement may consent to a disposition by the tenant in tail as if she were a *feme sole* (*u*) ; but a married woman who is tenant in tail can only disentail by a deed acknowledged with the concurrence of the husband (*v*), unless she acquired a title to the entailed property after the passing of the Married Women's Property Act, 1882, or was married after that date (*w*). A married woman may bar an equitable estate tail although she is restrained from anticipation (*x*).

Copyholds.—Copyholds are within the Act ; but a disposition of an estate at law is to be made by surrender, and of an equitable estate by surrender or deed. Where the consent is given by deed, it must be executed by the protector and produced to the lord of the manor at or before the time when the surrender is made by which the disposition is effected, and then entered on the Court rolls. And if such consent is not given by deed it must be given to the person taking the surrender by which the disposition is effected (*y*).

(*t*) 3 & 4 Will. IV., c. 27, ss. 21, 22; 37 & 38 Vict. c. 57, s. 9; *Murray v. Watkins*, 62 L. T. 796.

(*u*) 3 & 4 Will. IV., c. 74, s. 45.
(*v*) *Ib.* s. 40.

(*w*) *In re Drummond and Davie's Contract*, (1891) 1 Ch. 524.

(*x*) *Cooper v. Macdonald*, 7 C. D. 288.

(*y*) 3 & 4 Will. IV., c. 74, ss. 51, 52.

Equitable tenants in tail of copyholds are empowered to dispose of their interests by deed, in the same manner as freeholds, and the deed must be entered on the Court rolls ; and if a protector consent by a distinct deed, such deed must be executed by the protector on or before the day on which the disposition is executed by the equitable tenant in tail, and must be entered on the Court rolls of the manor (z).

Enrolment of Disposition.—A disposition by a tenant in tail of either legal or equitable estate in copyholds requires enrolment on the Court rolls only (a), and must be entered on the Court rolls within six months after its execution (b).

It has been doubted whether a mere declaration of trust duly enrolled is a "disposition" within the meaning of the Act so as to bar an estate tail (c).

The Bankruptcy Act, 1883, empowers the trustee in bankruptcy to deal with any property to which a bankrupt is entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same; and it is enacted that sects. 56 to 73 of the Fines and Recoveries Act shall extend to and apply to proceedings in bankruptcy under the Bankruptcy Act (d).

SECTION 4.

Dower.

Nature of Dower.—Dower is the estate of a widow in the lands of a husband who has died intestate, and amounts to a life-interest in one-third of the rents and profits.

(z) 3 & 4 Will. IV. c. 74, s. 53.

(c) *Ib.* at p. 108, *sed quære*.

(a) *Ib.* s. 54.

(d) 46 & 47 Vict. c. 52, s. 56

(b) *Green v. Patterson*, 32 C. D. 95.

ub-s. 5.

At common law dower only attached to a *legal* estate of inheritance in possession held either in severalty or in common (*e*). Dower in gavelkind land is one moiety of the rents and profits so long as the widow remains chaste and unmarried. The right to dower so far as regards women married since the 1st of January, 1834, is regulated by the Act to amend the Law relating to Dower (*f*).

Widow when entitled.—That Act provides that when a husband dies beneficially entitled to land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and equitable (*g*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) then his widow shall be entitled in equity to dower out of the same land (*h*).

Where a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she is to be entitled to dower out of the same although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (*i*). It will thus be seen that the widow must make her claim within the time allowed by the Acts for the Limitation of Actions and Suits relating to Real property (*j*).

Dower when barred.—The widow will not be entitled to

(*e*) Co. Lit. 31a.

(*h*) 3 & 4 Will. IV., c. 105, s. 2.

(*f*) 3 & 4 Will. IV., c. 105.

(*i*) *Ib.* s. 3.

(*g*) Cf. *In re Michell*, (1892) 2 Ch. 87.

(*j*) 3 & 4 Will. IV., c. 27; and

37 & 38 Vict. c. 57.

dower out of any land which shall have been absolutely disposed of by the husband in his lifetime or by his will (*k*), and all partial estates and interests, and charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, will be valid and effectual as against the right of his widow to dower (*l*).

The husband may also, either wholly or partially, deprive his wife of her right to dower by a declaration for that purpose made by him by any deed or by his will (*m*), which declaration, if contained in a conveyance will be effectual even though the purchaser may not execute it (*n*). But in a case where a husband had purchased property before the year 1834, which was conveyed to him to the usual uses to bar dower, and the conveyance contained a declaration that his present or any future wife should not be dowable, it was held that his widow, to whom he was married after the 1st of January, 1834, was entitled to dower (*o*).

If the husband devises land to his widow, out of which she is dowable if the same had not been devised to her, her right to dower out of any of the lands of her husband is destroyed unless the will provide to the contrary (*p*). But a gift of personalty for the benefit of the widow, or of lands not subject to dower, will not defeat the right of the widow, unless a contrary intention be declared by the will (*q*). And the Dower Act provides, that nothing

(*k*) 3 & 4 Will. IV., c. 105; s. 4;
and see *Lacey v. Hill*, 19 Eq. 346.

(*l*) 3 & 4 Will. IV., c. 105, s. 5.

(*m*) *Ib.* ss. 6, 7, 8.

(*n*) *Fairley v. Tuck*, 27 L. J.

(*o*) *Fry v. Noble*, 20 Beav. 598;
7 De G. M. & G. 687; *Clarke v.*

Franklin, 4 K. & J. 266.

(*p*) 3 & 4 Will. IV., c. 105, s. 9.

(*q*) *Ib.* s. 10.

therein contained shall prevent a Court of Equity from enforcing any covenant or agreement entered into by the husband not to bar the right of his widow to dower out of his lands or any of them (*r*).

Dower is barred if the marriage be dissolved by a divorce "*a vinculo matrimonii*," but is not affected by a mere judicial separation, formerly known as a "divorce *a mensa et thoro*" (*s*).

Dower is also barred by jointure (*t*) ; but such jointure must take effect in possession immediately on the death of the husband, and must be at least for the life of the wife (*u*), and may be made to the widow direct and not in trust for her, and it must appear by the deed creating the jointure to be in satisfaction of the whole dower (*v*). If the jointure be made after marriage, the wife may elect between her dower and her jointure ; and if evicted from the jointure, she is entitled to fall back upon her dower (*w*), and where the jointure is relied on in bar of dower a satisfactory title to the jointure land must be shown (*x*).

Dower is subject to abatement in respect of the widow's charge of £500 imposed on the intestate's estate by the Intestates' Estates Act, 1890 (*y*).

Uses to bar Dower.—It was formerly the practice, in cases in which dower would attach under the old law, for a purchaser to take a conveyance of lands to uses to bar dower, which in old conveyances will be found to be as follows. The conveyance was made to the purchaser and his heirs, to the use of the purchaser and a trustee ; the

(*r*) 3 & 4 Will. IV., c. 105, s. 11.

(*v*) *Tinney v. Tinney*, 3 Atk. 8.

(*s*) *Frampton v. Stephens*, 21 C.

(*w*) 27 Hen. VIII., c. 10, s. 7.

D. 164.

(*x*) *Dart, V. & P.* 584.

(*t*) 27 Hen. VIII., c. 10, s. 4.

(*y*) *Re Charriere*, (1896) 1 Ch.

(*u*) Co. Litt. 36 b.

912, see *supra*, p. 123.

estate of the trustee being in trust for the purchaser. But this method was somewhat objectionable, as, in the event of the death of the trustee in the lifetime of the husband, he became solely seised, and dower attached ; and so long as the trustee lived his concurrence was necessary in any disposition of the property. To remedy these objections the ordinary form of uses to bar dower was introduced, by which a grant was made to the purchaser and his heirs to such uses as he should appoint, and in default of appointment, and so far as the same should not extend to the use of the purchaser and his assigns during his life without impeachment of waste, with remainder to the use of a trustee, his executors, administrators and assigns during the life of the purchaser in trust for him and his assigns, with remainder to the use of the purchaser, his heirs and assigns. The dower of a woman married since the 1st January, 1834, is not excluded by uses to bar dower in a conveyance (z).

SECTION 5.

Freebench.

Dower does not attach to copyhold lands ; but somewhat similar in character is freebench, which is regulated by the custom of the manor of which the lands are holden. By the custom of most manors, the right to freebench does not usually attach until the decease of the husband (a), and consequently, he has in his lifetime complete power over the estate independently of the

(z) *Clarke v. Franklin*, 4 K. & J. 266. (a) 2 Watk. Cop. 73.

wife's concurrence; and a contract for sale will be enforced against the wife if the husband die before the sale is completed (*b*).

Freebench usually consists of a life interest in a third of the lands, though it sometimes extends to a life interest in the entirety (*c*), and is paramount to the debts of the husband (*d*).

SECTION 6.

Courtesy.

Courtesy is the life estate to which a husband is entitled on the death of his wife in her lands of inheritance.

This right attaches in respect of such lands or tenements as a wife dies possessed and of which she was actually seised in deed (*e*) during the coverture in fee simple or fee tail, or as tenant in common or in coparcenary, though not of land held in joint tenancy, or of a reversion or remainder which does not fall into possession during the coverture, and it also attaches to the equitable estates of the wife (*f*). But to entitle the husband to courtesy, there must have been issue of the marriage born alive during the life of the wife which might possibly have inherited the estate (*g*), and the marriage must not have been void, or avoided by a divorce (*h*).

Courtesy will also attach in respect of an equity of

(*b*) *Hinton v. Hinton*, 2 Ves. sen. 632; *Brown v. Randle*, 3 Ves. jun. 256.

(*c*) 1 Scriv. Cop. 89.

(*d*) *Spyer v. Hyatt*, 20 Beav. 621.

(*e*) *Seisin in law* is converted into *seisin in deed* by an actual entry or

act of ownership. (See Watkins on Descent, 61.)

(*f*) *Cooper v. Macdonald*, 7 C. D. 288.

(*g*) Co. Litt. 29 a.

(*h*) *Rennington v. Cole*, Noy 29,

redemption (*i*) and to an estate limited to a wife for her separate use (*j*).

In the case of copyholds, courtesy is commonly allowed by the custom of the manor (*k*). In the case of a gavel-kind land, the courtesy is of a moiety only, but attaches even where there is no issue. This courtesy ceases on the re-marriage of the husband (*l*).

The Married Women's Property Act does not deprive a husband of his rights as tenant by the courtesy (*m*).

SECTION 7.

Possession.

In the consideration of title we have hitherto confined our remarks to title by purchase or descent, but there is another mode by which a title to property may be acquired, viz., possession, and such title is now regulated by the Act for the Limitation of Actions and Suits relating to Real Property (*n*), which came into operation on the 1st January, 1834, and the Act for the Further Limitation of Actions and Suits relating to Real Property (*o*), which came into operation on the 1st January, 1879 (*p*), and which Acts are to be read and construed together, except so far as the first-named Act is repealed by the latter (*q*).

After the 1st January, 1879, the period within which an entry or distress can be made, or an action or suit brought to recover land or rent, is limited to twelve years

(*i*) *Casborne v. Scarfe*, 1 Atk. 603. (*m*) *Hope v. Hope*, (1892) 2 Ch. 336.

(*j*) *Roberts v. Dixwell*, 1 Atk. 607. (*n*) 3 & 4 Will. IV., c. 27.
(*o*) 37 & 38 Vict. c. 57.

(*k*) *Watk. Cop.* 71.

(*l*) *Co. Litt.* 30 a.

(*p*) *Ib.* s. 12.
(*q*) *Ib.* s. 9.

from the right having first accrued to the person making such entry or bringing such action or suit, or to the person through whom he claims (*r*).

Adverse Possession.—The Real Property Limitation Act of 1833 abolished the old doctrine of Adverse Possession and *possessio fratris*. No person is to be deemed to have been in possession by reason of having made an entry; nor will a right be preserved by continual claim being made upon or near the land. The possession of the entirety by one of several coparceners, tenants in common, or joint tenants is not to be deemed the possession of the person entitled; nor is the possession of the younger brother or other relation of the heir to be deemed the possession of the heir (*rr*).

Rent.—The word Rent in this section does not include a conventional rent reserved on a *lease for years* so as to extinguish the title of the lessor (*s*), but does include a tithe rent-charge in a lay impropriator or other rent-charge (*t*), and also quit rent payable in respect of copyholds and customary freeholds (*u*).

The recovery of arrears both of conventional and other rents is limited to six years (*v*); but this probably does not affect the liability of the original lessee to be sued on the covenant in the lease (*w*).

(*r*) 37 & 38 Vict. c. 57, s. 1; *Nepean v. Doe*, 4 Mee. & Wells, 494.

(*rr*) 3 & 4 Will. IV., c. 27, ss. 10-13.

(*s*) *Grant v. Ellis*, 9 M. & W. 113. The lessor's right can only be extinguished by payment of rent to a third party under s. 9 of 3 & 4 Will. IV., c. 27, not by mere non-payment of rent.

(*t*) *Commissioners of Ireland v. Grant*, 10 A. C. 14.

(*u*) *Howitt v. Earl of Harrington*, (1893) 2 Ch. 497.

(*v*) 3 & 4 Will. IV., c. 27, s. 42; *Conolly v. Gorman* (1898), I. R. 20.

(*w*) See *Darby and Bosanquet*, p. 199. The limitation for a specialty debt is twenty years under 3 & 4 Will. IV., c. 42, sect. 3.

Accrual of Right of Action.

The great difficulty in applying the statutes of limitations, is to ascertain when the right of action under those statutes accrues. It is proposed for the purposes of this treatise to treat this point under eight rules or headings.

Rule 1.—Dispossession.—“When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate, or interest claimed, have been in possession or in receipt of such rent, and shall while entitled thereto *have been dispossessed*, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rents were or was so received (*x*).” Notwithstanding the express language of this section, it has been held that it is not sufficient that the original owner should have discontinued his possession. It is necessary, in order to extinguish his title, that there should have been actual exclusive possession for the statutory period by some one else (*y*). When there has been a *series* of trespassers, not one of whom has been in possession for the statutory period, but who *claim through one another*, the title of the original owner is barred (*z*). In the case, however, of possession by a series of *independent* trespassers, the owner is only barred if the possession is *continuous* (*a*), but if there is *an interval* between the termination of possession of one trespasser and the

(*x*) 3 & 4 Will. IV., c. 27, s. 3.

Q. B. 1.

(*y*) *Agency Co. v. Short*, 18 A. C. 798.

(*a*) *Willis v. Howe*, (1893) 2 Ch. 353,

(*z*) *Asher v. Whitlock*, L. R. 1

entry of the next, the right of action of the owner accrues afresh (*b*).

Rule 2.—Reversion subject to a Written Lease for years.—The right of a lessor to recover in ejectment, accrues at the determination of the lease (*c*). Thus, a trespasser in possession may acquire a possessory title as against the lessee, and be entitled to continue in possession during the residue of the term, but the landlord will, nevertheless, have twelve years from the determination of the lease during which he may bring ejectment.

If, however, the lessee in possession pays the rent to some third party wrongfully claiming to be entitled to such rent in reversion immediately expectant on the determination of the lease, and no payment in respect of rent is subsequently made to the person rightfully entitled thereto, the right of the lessor accrues "at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid" (*d*). It is essential that the third person should receive the rents *as for himself*, and if he merely collects them as agent for whoever may eventually turn out to be the true owner, the person rightfully entitled may subsequently ratify this agency, and is not barred by the Statute (*e*).

Rule 3.—Right of Reversioner where no Lease in Writing.—When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent as tenant

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| (<i>b</i>) <i>Solling v. Broughton</i> , (1893) A. C. 561. | 131. |
| (<i>c</i>) 3 & 4 Will. IV., c. 27, s. 3, <i>Doe d. Davy v. Oxenham</i> , 7 M. & W. | (<i>d</i>) 3 & 4 Will. IV., c. 27, s. 9.
(<i>e</i>) <i>Lyell v. Kennedy</i> , 14 A. C. 456-457. |

from year to year or other period (*f*) *without any lease in writing*, the right of the person through whom he claims to make an entry or distress or to bring an action to recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods or at the last time when any rent payable in respect of such tenancy shall have been received *which shall last happen* (*g*). If, however, the person in possession is not a tenant for any fixed period, but is merely a tenant at will, the right of the reversioner accrues either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy (*h*). Consequently, if the tenancy is determined by notice to quit or otherwise, and a fresh tenancy at will is created, the reversioner's right of action accrues afresh (*i*).

Rule 4.—Right of Persons entitled in Remainder.—The right of action of a person entitled in remainder accrues at the time at which his estate or interest vests in possession. *Prima facie* a remainderman has twelve years from the time at which he becomes entitled in possession in which to bring his action. But if the person last entitled to any particular estate on which his interest is expectant has been out of possession for more than six years, the remainderman is barred after *six years* from the determination of the particular estate (*j*).

Rule 5.—Persons under Disability.—If the person entitled is an infant or a lunatic, he has a further period of

(*f*) This period cannot of course exceed three years.

(*i*) Cf. *Jarman v. Hale*, (1899) 1 Q. B. 994.

(*g*) 3 & 4 Will. IV., c. 27, s. 8.

(*j*) 37 & 38 Vict. c. 57, s. 2.

(*h*) *Ib.* s. 7.

six years in which to bring his action from the time that he has ceased to be under disability or has died (*k*). Absence beyond the sea is not now a disability (*l*), and thirty years is the utmost allowance for disabilities in any case (*m*).

Rule 6.—Acknowledgment.—When any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent *in writing* signed by the person in receipt of the profits of such land or in receipt of such rent, then the right of entry of the owner is deemed to accrue “at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given (*n*).” An acknowledgment in order to be effectual must be given before the twelve years or other statutory period has elapsed. The determination of the statutory limit will in every case extinguish the title of the original owner, and does not merely bar his right of action (*o*), and no subsequent acknowledgment can restore the title which has been extinguished by the statute (*p*).

Rule 7.—As between Mortgagor and Mortgagee.—A mortgagor in possession is not deemed a tenant at will of the mortgagee for the purposes of the statutes (*q*), except where the mortgage debt has been paid off but no reconveyance executed, in which case the legal estate of the mortgagee is extinguished after thirteen years (*r*).

(*k*) 37 & 38 Vict. c. 57, s. 3.

374.

(*l*) *Ib.* s. 4.

(*q*) 3 & 4 Will. IV., c. 27, s. 7

(*m*) *Ib.* s. 5.

(proviso).

(*n*) 3 & 4 Will. IV., c. 27, s. 14.

(*r*) *Sands* to *Thompson*, 22 C. D.

(*o*) *Ib.* s. 34.

614.

(*p*) *Sanders v. Sanders*, 19 C. D.

By the Real Property Limitation Act, 1837 (*rr*), it is enacted that the mortgagee shall have twelve years from "the last payment of any part of the principal money or interest secured by such mortgage," in which to bring his action. This Act does not confer a new right of entry on the mortgagee where, *at the time of making the mortgage*, a man is in possession holding adversely to the mortgagor, and the statute has already begun to run in his favour against the mortgagor (*s*). As between mortgagee and mortgagor, however, although a legal mortgagee can bring ejectment the moment after the mortgage is executed, time does not run against him so long as any interest is paid. If the mortgagor remains in possession and no principal or interest in respect of the mortgage debt is paid, and no acknowledgment in writing given for a space of twelve years, the right of the mortgagee is barred both as regards the land and also as regards his action on the covenant (*t*). On the other hand, if the mortgagee goes into possession, the mortgagor is debarred from bringing a redemption action at the end of twelve years from the time the mortgagee took possession, or from the last written acknowledgment (*u*).

Rule 8.—As between Trustee and Cestuis que Trust.—A *cestui que trust* in possession is not the tenant at will of the trustee for the purposes of the Statutes of Limitations (*v*). The possession of the *cestui que trust* is consistent with the title of the trustee, and will not operate to bar the trustee's title (*w*). On the other hand, in the

(*rr*) 7 Will. IV. & 1 Vict. c. 28.

(*s*) *Thornton v. France*, (1897) 2 Q. B. 148.

(*t*) *Sutton v. Sutton*, 22 C. D. 511.

(*u*) 37 & 38 Vict. c. 57, s. 7.

(*v*) 3 & 4 Will. IV., c. 27, s. 7
(proviso).

(*w*) *Darby and Bosanquet*, p. 356.

case of express trusts time will not run in favour of a trustee in possession against *cestuis que trustent* until there has been a conveyance by the trustee to a purchaser for value, and then only as against such purchaser (*x*). This section (twenty-fifth) must be construed as extending, in certain cases, the limit of time allowed by the preceding section, but not as in any way restricting it, so that time will not run against an equitable remainderman until his right to possession accrues (*y*). As between the *cestuis que trustent* and third persons, it is usually considered that if the rights of the trustees are barred, the *cestuis que trustent* are barred also (*z*); but this proposition seems open to doubt where the third party takes possession with notice of the trust (*a*).

Concealed Fraud.

The rules above stated as to the limitations to actions to recover land must be accepted, subject to this reservation, that in cases of concealed fraud no length of time will bar the title of the true owner.

Section 26 of 3 & 4 Will. IV. cap 27, which has received a very strict interpretation, deals with Concealed Fraud. In order to take a case out of the statute on the ground of concealed fraud, the person bringing the action must show that he, or some person through whom he claims, has been by such fraud deprived of the land which he seeks to recover, and that the fraud could not with reasonable diligence have been known or discovered more than the statutory period before the action (*b*).

(*x*) 3 & 4 Will. IV., c. 27, s. 25.

(*a*) *Scott v. Scott*, L. R., 4 H. L.

(*y*) *Thompson v. Simpson*, 1 Dru.

C. at pp. 1082, 1085.

& War. 459.

(*b*) *Lawrence v. Norreys*, 15 A. C.

(*z*) *Bolling v. Hobday*, 31 W. 210.

A *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time of making the purchase had no notice thereof, will not be affected (*c*); though this saving will not extend to a purchaser for value who contracted through an agent who was aware of the fraud, though the purchaser personally had no knowledge thereof (*d*).

Importance of the Statutes of Limitations as between Vendors and Purchasers.

The Statutes of Limitations do not affect the right of a purchaser under an open contract to have a forty years' title (*e*). In certain cases a possessory title acquired under the statutes has been forced on a purchaser (*f*); but having regard to the obvious difficulty of proving a *negative*, viz., that there never has been an acknowledgment in writing given to the original owner (*g*), it is very difficult for a vendor claiming merely by possession to make out a title without the aid of some special condition. Thus, even when a mortgagee has been in possession for over twelve years and the equity of redemption is barred, it is more usual for the mortgagee to sell by virtue of his power of sale (*h*).

The Acquisition of Easements by Prescription.

The several lengths of uninterrupted enjoyment which will confer a title in respect of rights of common, ways and watercourses, and the use of lights and other easements, are regulated by the Prescription Act.

(*c*) 3 & 4 Will. IV., c. 27, s. 26.

(*f*) *Scott v. Nixon*, 3 Dr. & War.

(*d*) *Vane v. Vane*, L. R., 8 Ch. 383.

368; *Garnett v. Bonnar*, 35 W. R. 64.

(*e*) *Cooper v. Emery*, 1 Ph. 388;

(*g*) Cf. *Re Alison*, 11 C. D. pp.

290 and 295.

it p. 869.

(*h*) Cf. *Re Alison*, 11 C. D. 284.

The Prescription Act provides that no claim to any right of common or other profit to be taken and enjoyed upon any land, except as in the Act provided, and except tithes, rent and services, shall be defeated after thirty years' enjoyment by showing that profit or benefit was taken or enjoyed at any time prior to such periods of thirty years; and when such right or profit shall have been enjoyed for sixty years, such right shall be deemed absolute and indefeasible, unless taken and enjoyed by some consent or agreement in writing (*i*).

Right of Way.—No claim to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed over or from any land, shall be defeated after twenty years' enjoyment by showing the commencement prior to such period of twenty years; and when the same shall have been enjoyed for forty years, the right shall be deemed absolute and indefeasible, unless taken and enjoyed by some consent or agreement in writing (*j*).

Right to Light.—When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years *without interruption* (*k*), the right thereto shall be deemed absolute and indefeasible, unless shown to have been enjoyed by consent or agreement in writing (*l*).

(*i*) 2 & 3 Will. IV., c. 71, s. 1.

(*j*) 2 & 3 Will. IV., c. 71, s. 2;

Gardner v. Hodgson's Kingston Breweries Co., (1900) 1 Ch. 592.

(*k*) *I.e.* adverse obstruction and not mere discontinuance of user; see

Smith v. Baxter, (1900) 2 Ch. 148.

(*l*) 2 & 3 Will. IV., c. 71, s. 8; but this section does not bind the Crown: *Perry v. Eames*, (1891) 1 Ch. 658; *Wheaton v. Maple & Co.*, (1898) 3 Ch. 48.

And it is not necessary that such building should have been occupied, or indeed fit for occupation, to entitle the owner to maintain an action for the obstruction of its lights (*m*); but a right to access of light to a house cannot be acquired under this section by the lapse of time during which the owner of the house or his occupying tenant is also the occupier of the land over which the right would extend (*n*).

Right to Air.—The Prescription Act does not apply to access of *air* (*o*). A right to have air come over a neighbour's land *in a particular channel, to a particular place*, may be established by immemorial user (*p*); but in the absence of an actual contract, no one can claim a right to have a *general current of air* over his neighbour's property kept uninterrupted (*q*).

Interruption.—Each of the before-mentioned periods are to be deemed to be the period next before some suit or action wherein the claim, to which such period may relate, shall be brought in question, and no act shall be deemed an interruption within the meaning of the Act unless the same shall be *acquiesced in for one year* after the party interrupted shall have notice thereof (*r*); but in order to negative such acquiescence, it is not necessary that the person interrupted should have taken any active steps to remove the obstruction, but it will be sufficient

(*m*) *Courtauld v. Legh*, L. R., 4 Ex. 126.

(*q*) *Chasty v. Ackland*, (1895) 2 Ch. 389.

(*n*) *Ladyman v. Grave*, 6 Ch. 763.

(*r*) 2 & 3 Will. IV., c. 71, s. 4;

(*o*) *Webb v. Bird*, 10 C. B., N. S. 268.

Flight v. Thomas, 8 Cl. & Fin. 231; *Bridewell Hospital v. Ward*,

(*p*) *Bass v. Gregory*, 25 Q. B. D. 481.

68 L. T. 232.

if he has in a reasonable manner communicated to the party causing the interruption that he does not acquiesce in it (s).

No presumption will be allowed in support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than such period mentioned in the Act as might be applicable to the case and nature of the claim (t).

Provisoes for Persons under Disability and Reversioners.—The time during which any person, otherwise capable of resisting any claim, shall have been under disability, shall be excluded in the computation of the periods before mentioned (u).

When land or water, upon or over which such way or watercourse shall have been enjoyed or derived, shall be held for any term exceeding three years from the granting thereof, the time of enjoyment during such term shall be excluded in the computation of the period of forty years, in case the claim shall within three years after the determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (v).

SECTION 8.

Settlement.

Settlement is another incident of title to which reference should be made.

(s) *Glover v. Coleman*, L. R., 10 C. P., 108; see also *Smith v. Smith*, L. R., 20 Eq. 500.

(t) 2 & 3 Will. IV., c. 71, s. 6.
(u) *Ib.* s. 7.
(v) *Ib.* s. 8.

Settlements by Infants.—Persons who are competent to sell their property are competent to settle it (*w*), and further than this, infants, though not able to sell their property, can, under certain circumstances, make a valid settlement of it; for it is provided by the Infants Settlement Act, 1855 (*x*), that every infant not under twenty if a male, and not under seventeen if a female, may make a binding settlement on his or her marriage, with the sanction of the Court of Chancery; though should a disentailing assurance have been executed by an infant tenant in tail under the provisions of the Act, and the infant should afterwards die under age, the disentailing assurance would thereupon become void (*y*). L6
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A settlement made by a *male* infant, or a settlement of *real* property by a *female* infant, if not confirmed by the Court, is voidable on the infant coming of age; but repudiation must be made within a reasonable time (*z*). Before the Married Women's Property Act, 1882, the settlement by a *female* infant on her marriage of personality (other than personality limited to her separate use), was regarded as a limitation by her husband of his marital rights, and was therefore binding (*a*); and by a strained construction put upon sect. 19 of that Act this has been held to be still the law (*b*).

Marriage Consideration.—Marriage is a valuable consideration, and a settlement made previously to and in

(*w*) Atherley on Set. 11.

C. 360.

(*x*) 18 & 19 Vict. c. 43.

(*a*) *Simson v. Jones*, 2 R. & My.

(*y*) *Ib. s. 2; In re Scott*, (1891)

365.

1 Ch. 298.

(*b*) *Stevens v. Trevor-Garrick*,

(*z*) *Edwards v. Carter*, (1893) A.

(1893) 2 Ch. 307.

consideration of marriage will, so far as concerns the interests of those whose claims are within the marriage consideration (viz., the husband and wife and their issue), be supported against both purchasers and creditors; and a settlement though made after marriage, if made in accordance with articles executed previously to marriage, or if made of property impressed with an executory trust existing before marriage, will, in like manner, be effectual: so also will a settlement made after marriage if made for any valuable consideration other than marriage, such as the payment of a portion; the giving up of an interest in the settlor's estate, or the like, if of sufficient amount (*c*); a covenant to indemnify the settlor against charges on the estate settled (*d*); or the advance of a sum of money to pay outstanding charges on the property (*e*). The making of a settlement in consideration of marriage, however, is, by the Bankruptcy Act, 1883, declared fraudulent in case the settlor is not at the time of the making thereof able to pay his debts without the aid of the property comprised therein; and if the settlor should become bankrupt, or compounds with his creditors, and it appears to the Court that such settlement was made to defeat or delay creditors, or was unjustifiable, having regard to the settlor's affairs, his discharge may be suspended or refused, or the Court may refuse to approve a composition or arrangement. These provisions, however, do not appear to render the settlement itself void or voidable. A settlement, however, not made for a val-

(*c*) *Atherley*, 151; *Teasdale v. D.* 619.

Braithwaite, 5 Ch. D. 630.

(*e*) *Bayspoole v. Collins, L. R.*,

(*d*) *Townend v. Toker, L. R.*, 1

Ch. 228.

Ch. 446; *Price v. Jenkins*, 5 Ch.

able consideration, is a voluntary settlement, and as such is liable to be defeated by creditors or *bond fide* purchasers for valuable consideration in certain events presently referred to; and trusts in a settlement made in contemplation of marriage in favour of the children of a future marriage or of collaterals are purely voluntary (f).

As to Settlements liable to be defeated by the Creditors of the Settlor.

I. Under 13 Eliz.—By stat. 13 Eliz. c. 5, the gift or alienation of any lands, tenements, or hereditaments, goods and chattels, made for delaying, hindering, or defrauding creditors, is made void as against such creditors, unless made upon good consideration and *bond fide* to a person not having at the time notice of such fraud.

The term “good consideration” in the statute means valuable, such as money or marriage, and does not include a meritorious consideration, as for love and affection (g).

A *bond fide* purchaser of any interest under the deed impeached is protected, whether such interest be legal or equitable (h).

The mere circumstance of a settlement being a voluntary one will not, except in cases coming within sect. 47 of the Bankruptcy Act, 1883 (i), render it void under the statute, if its object be not to defeat or delay creditors. It has been doubted whether it is necessary to prove an actual intent to defeat creditors in order to upset a

(f) *Wollaston v. Tribe*, L. R., 9 Eq. 44.

(g) *Copis v. Middleton*, 2 Mad. 430.

(h) *Halifax Joint Stock Banking Company v. Gledhill*, (1891) 1 Ch. 31.

(i) 46 & 47 Vict. c. 52.

settlement under the statute of Elizabeth (*j*). The better opinion, however, appears to be, that in order to reach a settlement under this statute it must be shown that the conveyance was of the whole, or substantially the whole, of the debtor's property, and that the assignees had notice that he was cheating his creditors (*k*).

II. Under Section 4 of the Bankruptcy Act.—By sect. 4 (b) of the Bankruptcy Act, 1883, it is enacted that a debtor commits an act of Bankruptcy "if in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or *any part thereof*." The effect of this is, that if a Bankruptcy Petition is presented within three months of this fraudulent conveyance, and the debtor is eventually adjudicated bankrupt, the title of the trustee will relate back so as to defeat the transaction (*l*). To some extent this provision extends the statute of Elizabeth, but even in this case it is necessary to prove that there was collusion on the part of the assignee, otherwise the transaction will be protected by sect. 49 (*m*).

III. Under Sect. 44.—Sect. 44. sub-sect. 2 (ii), of the Bankruptcy Act, when read with sect. 54, empowers the trustee in bankruptcy to exercise all such powers in or over or in respect of property as might have been exercised by the bankrupt "*for his own benefit*." A power

(*j*) *Freeman v. Pope*, 5 Ch. 538.

(*k*) *Ex parte Mercer*, 17 Q. B. D. 290; *Godfrey v. Poole*, 13 A. C. at p. 503; *Re Poppleton and Jones*, 74 L. T. 582; *Re Carl Hirth*, (1899) 1 Q. B. 620.

(*l*) See Bankruptcy Act, 1883,

ss. 43, 44, and 54. *Re Carl Hirth*, (1899) 1 Q. B. 621-2.

(*m*) *Shears v. Goddard*, (1896) 1 Q. B. 406.

of revocation reserved to the settlor by a settlement may therefore be exercised by his trustee in bankruptcy.

IV. Under Sect. 47.—Sect. 47 of the same Act provides that a *voluntary* settlement shall, if the settlor becomes bankrupt within *two years* from the date of the settlement, be *ipso facto* void as against the trustee in bankruptcy. If the settlor becomes bankrupt within *ten years* after the date of such settlement, it is void against such trustee, unless the parties claiming under it can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement. The word void used in this section should be construed as *voidable*, so that a *bona fide* purchaser for value from the donee or trustees of the settlement prior to the bankruptcy is protected (*n*).

It must be borne in mind that, if the settlor is dead, a settlement cannot be upset in administration proceedings under sect. 125 of the Bankruptcy Act (*o*).

**As to Settlements which are void against bona fide
Purchasers for Value.**

The 27th Eliz. c. 4, which does not apply to purely personal property, though it extends to chattels real (*p*), provides that conveyances of any estate in lands, tenements, or other hereditaments, made with the intent to defraud purchasers, and conveyances of such estate made with any clause of revocation at the will of the grantor, are void against subsequent purchasers for value. By a

(*n*) *Re Carter and Kenderline's Contract*, (1897) 1 Ch. 776.

(*o*) *In re Gould*, 19 Q. B. D. 93.
(*p*) Co. Litt. 3 b.

strained construction of this statute, it was held, prior to the 29th June, 1893, that all *voluntary* conveyances were void as fraudulent as against subsequent purchasers for value from the settlor. Thus a voluntary settlor could defeat a settlement of real property by a subsequent sale, or could defeat it *pro tanto* by a mortgage, whether legal or equitable, and it made no difference that the purchaser or mortgagee had notice of the settlement (*q*).

With regard to *leaseholds*, however, it was held, in *Price v. Jenkins* (*r*), that the liability to pay rent and perform covenants undertaken by the assignee was sufficient consideration to prevent the settlor from availing himself of the provisions of 27 Eliz. c. 4, although it is insufficient to support a settlement in case of bankruptcy. Moreover, it was held, in *Prodger v. Langham* (*s*), that if the trustees of a voluntary settlement sold the property to a purchaser for value, the settlement was confirmed, and could not subsequently be overridden by the settlor. It should also be remembered that a settlement could not be defeated under the act after the death of the settlor.

By the Voluntary Conveyances Act, 1893 (*t*), it is enacted that voluntary conveyances, if made *bona fide*, shall not be defeated under the provisions of 27 Eliz. c. 4. By sect. 2 an exception is made with regard to sales by voluntary settlers prior to the 29th June, 1893. If, however, the title-deeds are in the hands of the voluntary donee, and he is in possession of the property, it is submitted that a purchaser, prior to the Voluntary Convey-

(*q*) See *Ellison v. Ellison*, Wh. & T. L. C., Vol. I., and notes thereto.

(*r*) 5 C. D. 619.

(*s*) 1 Sid. 133.

(*t*) 56 & 57 Vict. c. 21.

ances Act, who has lain by ever since that time would be barred by his *laches* (*u*).

A Voluntary Settlement must not rest in Fieri.

A voluntary settlement, to be effectual, should be complete, and should not rest in contract, for an agreement to do an act when called upon, if simply voluntary, cannot be enforced (*v*), unless the relation of trustee and *cestui que trust* be created (*w*) ; and a mere declaration of trust by the settlor, if complete, will be sufficient to create such relation (*x*). It was, however, held in one case, which has since been doubted (*y*), that a covenant by a widow on her second marriage to settle property for the benefit of her children by a former marriage, if made pursuant to an agreement between her and her intended husband, will be enforced at the suit of the children (*z*).

It is now well settled that a voluntary deed, purporting to be a complete transfer of property, but not effectual as such, will not be construed as a declaration of trust so as to be binding in equity (*a*). So, too, if the document purporting to be the deed of gift is of an incomplete testamentary character, it will not amount to a valid declaration of trust (*b*), and a settlor or his representatives cannot be compelled under the voluntary settlement to do any further act to render it binding (*c*) ; though it

- (*u*) *Noyes v. Patterson*, (1894) 3 Ch. 270.
- (*v*) *Pownall v. Anderson*, 2 Jur., N. S. 857 ; *Antrobus v. Smith*, 12 Ves. 39.
- (*w*) *Kekewich v. Manning*, 1 De G., M. & G. 188.
- (*x*) *Ex parte Pye*, 18 Ves. 150.
- (*y*) See *Att.-Gen. v. Jacobs-* *Smith*, (1895) 2 Q. B. 349.
- (*z*) *Gale v. Gale*, 6 Ch. D. 144.
- (*a*) *Richards v. Delbridge*, 18 Eq. 11 ; *Lewin on Trusts*, p. 73.
- (*b*) *Warrener v. Rogers*, L. R., 16 Eq. 340.
- (*c*) *Denning v. Ware*, 22 Beav. 184 ; *Heartley v. Nicholson*, L. R., 19 Eq. 233.

has been held, in a case in which the voluntary deed contained a covenant for further assurance, and the estate of the settlor was administered in the Court of Chancery after his death, the volunteer was entitled to damages out of the estate for breach of the covenant (*d*).

SECTION 9.

Rent Charges and Land Tax.

Rent Charges created by Deed.—A rent charge arises on a grant by one person to another of an annual sum of money payable out of certain lands in which the grantor may have any estate (*e*). It seems doubtful whether a rent-charge can be properly created issuing out of a term of years (*f*). Sect. 44 of the Conveyancing Act, 1881, confers certain remedies on the owner of a rent-charge, whether charged on land or the income thereof, viz :

- (1.) A power of distress when the rent is in arrear for twenty-one days.
- (2.) A right of entry when the rent is in arrear for forty days.
- (3.) Power in a like case to demise the land for a term of years to a trustee upon trust to receive the arrears by mortgage, sale or demise (*g*).

(*d*) *Cox v. Barnard*, 8 Hare, 310.

(*e*) Williams' Real Property, p. 401.

(*f*) —— v. *Cooper*, 2 Wilson, 375.

(*g*) These provisions now apply

to improvement rent-charges (see 62 & 63 Vict. c. 46, s. 8), and rent-

charges created on enfranchisement of Copyholds, 57 & 58 Vict. c. 46, s. 27.

In addition to these statutory remedies the owner of a rent-charge may sue the terre-tenant for debt (*h*), even in the absence of an express contract to pay the rent (*i*), and notwithstanding that the profits of the land fall short of the amount of the annual charge (*j*). The expression terre-tenant means the person in possession of the land subject to the charge as tenant in fee, and does not include a tenant for years (*k*).

Tithe Rent-Charge.—By the Tithe Commutation Act, 1836 (*l*), the payment of tithe was abolished, and the payment of a sum in the nature of a rent-charge substituted, varying with the price of wheat, barley and oats, and calculated on a septennial average. Tithe rent-charge is now payable by the owner, and not by the occupier of the land charged (*m*), and the only means of recovering it is to apply to the County Court, when the rent is three months in arrear, and obtain an order for a receiver, or in case the land is in hand, for a distress by an officer of the Court (*n*).

Land Tax.—Land Tax was originally an annual impost only. In the year 1798 an apportionment of land tax was made by the commissioners under the Land Tax Act of 1797 (*o*), and the amount then charged on every parish, known as “the parish quota,” was made perpetual by the statute 38 George III., cap. 60, but subject to redemption. This parish quota is assessed annually between the owners

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| (<i>h</i>) <i>Thomas v. Sylvester</i> , L. R., | Ch. 811. |
| 8 Q. B., 368. | (<i>l</i>) 6 & 7 Will. IV., c. 71. |
| (<i>i</i>) <i>Ex parte Graham</i> , 42 C. D. | (<i>m</i>) See Tithe Act, 1891, 54 Vict. |
| 369; <i>Searle v. Cooke</i> , 43 C. D. 532. | c. 8, s. 1. |
| (<i>j</i>) <i>Pertwee v. Townsend</i> , 1896, | (<i>n</i>) <i>Ib.</i> s. 2. |
| 2 Q. B. 129. | (<i>o</i>) 38 Geo. III., c. 5. |
| (<i>k</i>) <i>Re Herbage Rents</i> , (1896) 2 | |

or occupiers of land, subject to land tax, but the amount assessed in any year on any parish must not exceed one shilling in the pound on the annual value of the land in the parish, subject to land tax, and the excess is remitted (*p*). Until recently land tax was redeemed under the Land Tax Redemption Act, 1802 (*q*), and it has been held under that statute that, where land tax is redeemed by a limited owner, the question whether the charge merges in the inheritance depends upon intention to be evidenced by the acts of the party (*r*). Land tax is now redeemable under the Finance Act, 1896 (*s*), and the redemption money may be paid in one sum or by annual instalments (*t*). Any person having an estate in lands and tenements (except tenants at rack rent or holding under the Crown) may contract for the redemption of the Land Tax charged thereon.

Where any person redeems land tax by payment of a capital sum, the Commissioners of Inland Revenue will, on his application at the date of redemption, grant to him a certificate charging the property with the amount of that sum, and with interest equal to the amount of the land tax redeemed, and he will be entitled to the charge as if it were a mortgage secured to him by a mortgage deed; and such charge, when the certificate is registered in pursuance of the Lands Charges Act, 1888, will have priority over all other charges and incumbrances, and any money authorised to be invested in real security may be invested on the security of any such charge. An apportionment of land tax may

(*p*) 59 & 60 Vict. c. 28, s. 31.

(*s*) 59 & 60 Vict. c. 28, ss. 31-36.

(*q*) 42 Geo. IV., c. 116.

(*t*) See Chandler on Land Tax,

(*r*) *Trevor v. Trevor*, 2 M. & K.

p. 64.

be made under sect. 35 of the Act of 1802 for the purposes of redeeming a portion of property which is charged by the current assessment in one sum. Land Tax is assessed as from Lady Day in each year, and is payable on or before the first day of January following.

Other Statutory Charges on Land.

By the statute 8 & 9 Vict. c. 56, tenants for life, and certain other persons having a limited interest in lands, were empowered, with leave of the Court of Chancery, to make permanent improvements by draining with tiles, stones, or other durable materials, or by warping, irrigation or embankment in a permanent manner, or by erecting thereon any buildings of a permanent kind incidental or consequential to such drainage, &c., and to charge the money expended in making such improvements, and obtaining the authority of the court, upon the inheritance, such interest not exceeding five per cent. per annum, the principal to be repayable by annual instalments as therein mentioned (*u*).

The Public Money Drainage Acts (*v*) empower tenants for life and other owners of land to obtain advances from Government for drainage works to be completed within five years (*w*), such advances to be paid by a rent-charge of £6, 10s. per cent., payable for a term of twenty-two years (*x*).

The Improvement of Land Act, 1864 (*y*), provides for the raising of money by way of rent-charge for the improvement of land at a rate of interest not exceeding

(*u*) Sects. 3, 4, 5, 8, 9.

c. 9.

(*v*) 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict.

(*w*) 10 & 11 Vict. c. 11, s. 7.

(*x*) 9 & 10 Vict. c. 101, s. 34.

(*y*) 27 & 28 Vict. c. 114.

5 per cent. per annum, and to be repayable by instalments over a period not exceeding twenty-five years (*z*) which is now extended to forty years by a recent enactment (*a*).

By sect. 55 of this Act the absolute order of the Commissioners, now the Board of Agriculture, is conclusive as to the validity of the charge. The holder of the charge may by deed direct that it shall be reunited to and merge in the beneficial interest in the land, but the charge is deemed to be personal property (*b*). The Settled Land Act, 1882, extended and partially repealed the Improvement of Land Act, 1864.

By the Improvement of Land Act, 1899, the charge may comprise not only the land improved, but also any other land held for the same estates or interests and either subject to the same incumbrances or free from incumbrances (*c*).

The Limited Owners' Residences Acts (*d*) provide that the erection of a mansion house and such other necessary buildings commonly appurtenant, and the completion of any mansion house and such appurtenances already erected, and the improvement of, and addition to, any house capable of being converted into a mansion house, shall be deemed improvements within the meaning of the Improvement of Land Act, 1864, but the sum to be charged on the estate for such purpose is not to exceed two years' rental of the whole estate (*e*).

The Limited Owners' Reservoirs Act, 1877 (*f*), further

(*z*) 27 & 28 Vict. c. 114, s. 26. sub-s. 2.

(*a*) 62 & 63 Vict. c. 46, s. 1, sub-s. 1. (*d*) 33 & 34 Vict. c. 56; 34 & 35 Vict. c. 84.

(*b*) 27 & 28 Vict. c. 114, s. 60.

(*c*) 33 & 34 Vict. c. 56, s. 4.

(*c*) 62 & 63 Vict. c. 46, s. 1,

(*f*) 40 & 41 Vict. c. 31.

extends the provisions of the Improvement of Land Act, 1864, to the construction by limited owners of reservoirs and other permanent works for the supply of water.

An improvement rent-charge is an incumbrance within the meaning of sect. 5 of the Settled Land Act, 1882 (*g*).

SECTION 10.

Long Terms of Years.

Satisfied Terms.—Long terms of years are sometimes made use of in conveyancing, generally for the purpose of securing the payment of money, *e.g.*, raising portions for younger children. These terms, generally for five hundred or one thousand years, did not formerly determine, even although the purposes for which they were created had been fully performed and satisfied, unless there was an express proviso for cesser inserted in the deed by which the term was created, or unless the term had merged in the freehold by operation of law. It was formerly the custom for a purchaser to keep on foot a satisfied term by having it assigned to a trustee *in trust to attend the inheritance*. The object of this was two-fold, *viz.*, as a protection against any undisclosed incumbrance on the property, and to defeat the claim of the purchaser's wife to dower. The Satisfied Terms Act (*h*), however, now provides that every term of years becoming *satisfied* after the 31st December, 1845, and which either by express declaration or by construction of law shall after that day become

(*g*) *Re Stafford and Maples*, (1896) (*h*) 8 & 9 Vict. 112, s. 2.
1 Ch. 285.

attendant upon the inheritance or reversion of any land, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

A term is not satisfied within the meaning of the Act so long as there remains any useful purpose beneficial to the owner of the term and consistent with the trust on which at the date of the transaction the term was held (*i*).

Enlargement of Long Terms.—Under sect. 65 of the Conveyancing Act, 1881 (*j*), as amended by sect. 11 of the Conveyancing Act, 1882 (*k*), long terms of years, whether having an immediate reversion of freehold or not, may be enlarged into freehold by a deed of declaration, provided that they fulfil certain conditions.

These conditions are as follows:—

- (1.) The term must have a residue unexpired of not less than two hundred years, and must have been originally created for not less than three hundred years.
- (2.) There must be no trust or right of redemption by the freeholder or other person entitled in reversion expectant on the term.
- (3.) There must be no rent, or only a nominal rent, such as a peppercorn or one silver penny (*l*), or, if rent of a money value was originally reserved, the same must have been released or barred by lapse of time.

(*i*) *Anderson v. Pignet*, 8 Ch. 180.
 (*j*) 44 & 45 Vict. c. 41.
 (*k*) 45 & 46 Vict. c. 39.
 (*l*) *Re Chapman and Hobbs*, 29 C. D. 1007.

- (4.) The term must not be liable to be determined by re-entry for condition broken.
- (5) The term must not have been created by sub-demise out of a superior term which does not itself comply with the first four conditions.

The estate in fee simple acquired by enlargement is subject to all the same trusts, powers, executory limitations over rights and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged (*m*).

SECTION 11.

Enfranchisement of Copyholds (*n*).

In many cases, property which was originally of copyhold tenure has been converted into freehold by enfranchisement, and where land has been treated as freehold for upwards of one hundred years an enfranchisement has been presumed (*o*). There are three methods by which copyholds may now be enfranchised, viz., a voluntary enfranchisement at common law, a voluntary enfranchisement under the Copyhold Act, 1894 (*p*), and a compulsory enfranchisement under that Act.

✓ I.—An enfranchisement at common law can only be made where the lord has an estate in fee in the manor or

(*m*) C. A., (1881) s. 65, sub-s. 4.

(*n*) See also *Scriv. Cop.*, 7th ed. 1896; and *Brown, Cop. Enfranchisement*, 2nd ed., 1895.

(*o*) *Rc Lidiard*, 42 C. D. 254,

but cf. *Ecclesiastical Commissioners v. Parr.*, (1894) 2 Q. B. 420.

(*p*) 57 & 58 Vict. c. 46.

a power to convey the fee simple (*q*), or where he is tenant for life under the Settled Land Act (*r*). It seems that a copyholder with only an equitable or limited estate may accept an enfranchisement at common law (*s*).

II.—A voluntary enfranchisement under the Copyhold Act, 1894 (*t*), is the method adopted where the lord has no power to enfranchise at common law or under the Settled Land Acts. This kind of enfranchisement is made by agreement between the lord and the tenant with the consent of the Board of Agriculture (*u*). With regard to limited owners, the Act provides that notice in writing of the proposed enfranchisement must be given to the person entitled to the next estate of inheritance in remainder or reversion in the manor or land to be affected by the enfranchisement, but in the case of the tenant this is not necessary if he has paid the whole cost of the enfranchisement (*v*). A voluntary enfranchisement under the Act is “effected, with the consent of the Board of Agriculture, by such a deed as would be proper on an enfranchisement by a lord seised of the manor for an absolute estate in fee simple in possession” (*w*).

III.—A compulsory enfranchisement is only resorted to where the lord and tenant cannot agree as to the terms of enfranchisement, or where one or other is opposed to an enfranchisement being made. The enfranchisement is made by an award of the Board of Agriculture, and can be obtained either by the lord or the tenant; but when

(*q*) *Scriv. Cop.*, 1896, p. 326. 14–20.

(*r*) 45 & 46 Vict. c. 38, s. 3, sub-s. 2. (*u*) 57 & 58 Vict. c. 46, s. 14, sub-ss. 1 and 2.

(*s*) *Scriv. Cop.*, 1896, p. 327. (*v*) *Ib.* s. 14, sub-s. 3.

(*t*) 57 & 58 Vict. c. 46, ss. (*w*) *Ib.* s. 16, sub-s. 1.

the tenant has been admitted in respect of a mortgage, he cannot require an enfranchisement unless he is mortgagee in possession (*x*). Prior to 1858 the enfranchisement had to be by deed. The award of the Commissioners was registered under sect. 9 of the Copyhold Act, 1852, but by sect. 33 the execution of the deed by the Commissioners was conclusive. The Act of 1858 (sect. 10) did away with the necessity for a deed and substituted an award.

The conversion of copyhold land into freehold by enfranchisement does not affect the rights or interest of any person in the land under a will, settlement, mortgage or otherwise; nor does it affect subsisting leases; and the land is held under the same title as that under which it was held at the date at which the enfranchisement takes effect (*y*).

SECTION 12.

Succession Duty.

Succession.—By the Succession Duty Act which came into operation on the 19th May, 1853, every disposition of property by reason whereof any person becomes beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of the Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commence-

(*x*) 57 & 58 Vict. c. 46, s. 1.

(*y*) *Ib.* s. 21.

ment of the Act to any other person in possession or expectancy, shall be deemed to have conferred a *succession* upon the person so entitled, who is known as the *successor*. The term *predecessor* denotes the person from whom the interest of the successor is derived (z). A reversion which vests before the Act, but does not come into possession until after the commencement thereof, is liable to duty (a) This section (second) has also been held to apply to all cases of succession which do not come within any other section of the Act (b).

When persons have property vested in them jointly by a title not conferring a succession, any interest accruing by survivorship is deemed a succession (c).

Appointments under Powers.—When a person has a *general* power of appointment under a disposition of property taking effect on the death of a person dying after the time appointed for the commencement of the Act, he shall, in the event of his making an appointment thereunder, be deemed to be entitled at the time of exercising the power to the interest appointed as a succession derived from the donor of the power; and where a person has a *limited* power of appointment under such a disposition, the person taking the appointed property will be deemed to take the same as a succession derived from the person *creating* the power as predecessor (d). The first part of this section (fourth) only applies to an absolute

(z) 16 & 17 Vict. c. 51, s. 2. As to meaning of "predecessor," see *Att.-Gen. v. Dowling*, 5 Ex. D. 139.

(a) *King v. Jarman*, L. R., 14 Eq. 357.

(b) *Re Lovelace*, 4 De G. & J.

340; *Att.-Gen. v. Gardner*, 32, L. J., Ex. 84.

(c) 16 & 17 Vict. c. 51, s. 3.

(d) *Ib.* s. 4; *Att.-Gen. v. Upton*, L. R., 1 Ex. 224.

power possessed by one person enabling him to dispose of property as absolute owner, and does not apply to a power given in a family settlement to a father and son where one is intended to be a check upon the other (*e*).

Extinction of Determinable Charges.—Where the property is subject to a charge, estate or interest determinable by death or at any period ascertainable only by reference to death, the increase of benefit accruing to any person on the extinction or determination of the charge will be deemed a succession accruing to the person then entitled beneficially to the property or the income thereof (*f*); but a person entitled at the commencement of the Act to real property subject to leases for lives, or for years determinable on life, is not liable to duty in respect of the determination of such leases in the event of the same occurring in his lifetime (*g*).

Reservations.—Where any disposition of property, not being a sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, is accompanied by a reservation or assurance of or contract for any benefit to the grantor or any other person for life, or for any period ascertainable only by reference to death, such disposition will confer, at the time appointed for the determination of such benefit, an increase in such beneficial interest in such property as a succession equal in annual value to the yearly value of the benefit so reserved (*h*).

Dispositions of property to take effect at a period ascer-

- (*e*) *Charlton v. Att.-Gen.*, 4 A. C. cf. 52 Vict. c. 7, s. 6, sub-s. 5 (b).
 427. (*g*) 16 & 17 Vict. c. 51, s. 6.
 (*f*) 16 & 17 Vict. c. 51, s. 5; and (*h*) *Ib.* s. 7.

tainable on death, and fraudulent dispositions made for evading duty, will confer successions (*i*).

Transferred Interests.—Where reversionary property expectant on death is vested by alienation or other derivative title in any person, such person will be charged with duty at the same time and rate as the original successor would have been chargeable if there had been no alienation; and where any succession shall, before falling into possession, have become vested by alienation or any title not conferring a succession in any other person, the duty must be paid at the same rate and time as if there had been no such alienation (*j*); and where the title to any succession shall be *accelerated* by the surrender or extinction of any prior interest, the duty will be payable as if there had been no such acceleration (*k*); but the duty on succession in expectancy may be commuted under sect. 41.

Interest of the Successor.—The interest of a successor to real estate was formerly considered to be of the value of an annuity equal to the annual value of such property (*l*). Now, however, when the successor is *competent to dispose* of the property, the value of the succession is taken to be the principal value of the property after deducting estate duty (*m*).

Succession Duty is paid by eight equal half-yearly instalments, or in the case of successions after 1st July,

(*i*) 16 & 17 Vict. c. 51, s. 8.

Ex parte Sitwell, 21 Q. B. D. 466;

(*j*) *Attorney-General v. Lancashire Reversionary Interest Society*, L. R., 8 Ex. 238.

but cf. *Att.-Gen. v. Robertson*, (1893) 1 Q. B. 298.

(*k*) 16 & 17 Vict. c. 51, s. 15;

(*l*) 16 & 17 Vict. c. 51, s. 21.

(*m*) 57 & 58 Vict. c. 30, s. 18.

1888, in two equal moieties (*n*). The first of the instalments must be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the property. If the successor die before the instalments have become due, the instalments not due at his decease will cease to be payable, except in the case of a successor who may have been competent to dispose by will (*o*) of a continuing interest in such property, in which case the instalments unpaid at his death will be a continuing charge on such interest in exoneration of his other property, and will be payable by the owner for the time being of such interest (*p*); and it has been held that the circumstance of a person becoming entitled and dying before all the instalments of duty are payable, being insane or a *feme covert*, does not exempt the estate of such person from the unpaid instalments (*q*), and the case of a tenant in tail who disentails and acquires the fee, and dies before all the instalments have become payable, is not within the exemption (*r*).

In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance is to be made of all necessary outgoings (*s*); but where the legal estate is vested in trustees, the parties beneficially interested will not be entitled to deduct as necessary

(*n*) 51 Vict. c. 8, s. 22.

N. 368.

(*o*) *Att.-Gen. v. Hallett*, 2 H. & N. 368.

(*r*) *Lilford v. Att.-Gen.*, L. R., 2 H. L. 63.

(*p*) 16 & 17 Vict. c. 51, s. 21.

(*s*) 16 & 17 Vict. c. 51, s. 22.

(*q*) *Att.-Gen. v. Hallett*, 2 H. &

outgoings expenses of management incurred by such trustees (*t*).

By sect. 38 of the Succession Duty Act, which has received a very liberal construction (*u*), where any successor upon taking a succession shall be bound to relinquish or be deprived of any other property, he is entitled to an allowance in respect of such property in computing the assessable value of his succession.

Duty a First Charge.—The duty imposed is a first charge on the interest of the successor, and of all persons claiming in his right, on all the real and personal property in respect whereof the same is assessed, and the duty will be a debt due to the Crown from the successor, having, in the case of real property, priority over all charges and interests created by him, but such duty does not charge or affect any real property of the successor other than the property comprised in the succession.

Exemptions from Duty.—No succession duty is payable in the following cases :—

- (1.) When the successor is the husband or wife of the predecessor (*v*).
- (2.) When the principal value of the whole property is under £100.
- (3.) Where the succession takes place on the death of some person after the 1st of August, 1894, the net value of whose property does not

(*t*) *In re Elwes*, 3 H. & N. 719; *In the Matter of Earl of Cowley's Suc.*, L. R., 1 Ex. 288.

(*u*) *Commissioners of Inland Revenue v. Harrison*, L. R., 7 H. L. 1. (*v*) 16 & 17 Vict. c. 51, s. 18.

exceed £1000 and Estate Duty has been paid on such property (*w*).

In addition to these cases in which no duty is payable, a purchaser is not concerned with the question whether Succession Duty has been paid in any of the following cases:—

- (1.) When land is sold under an overriding power of sale whether such power is express or implied (*x*).
- (2.) When land is sold in pursuance of a trust for sale (*y*).
- (3.) When the sale is made under the Settled Estates Act (*z*) or the Settled Land Acts (*a*).
- (4.) If the succession took place more than twelve years before the sale (*b*).

Receipt.—Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession, or any part thereof, will exonerate a *bonâ fide* purchaser for valuable consideration and without notice from such duty, notwithstanding any suppression or mis-statement in the account, upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration, under a title not appearing to confer a succession, shall be subject to any duty with which such property may be chargeable under the provisions of this Act, by reason of any extrinsic

(*w*) 57 & 58 Vict. c. 30, s. 16.

(*z*) *Re Warner*, 17 C. D. 711.

(*x*) 16 & 17 Vict. c. 51, s. 42;

(*a*) Dart, V. & P. 669.

Dugdale v. Meadows, 6 Ch. 501.

(*b*) 52 Vict. c. 7, s. 12.

(*y*) *Ib.* s. 29.

circumstances of which he may not have had notice at the time of such purchase (*c*).

Additional Duties.—By the Customs and Inland Revenue Act, 1888 (*d*), an *additional succession duty* was made payable in respect of successions upon deaths on or after the 1st July, 1888. This duty was at the rate of 10s. per centum when the successor was the lineal issue or ancestor of the predecessor, and in all other cases £1, 10s. per centum (*e*).

By the Customs and Inland Revenue Act, 1889 (*f*), a TEMPORARY ESTATE DUTY of one per cent. was imposed upon successions on the death of any person after the 1st of June, 1889, either where the value of such succession exceeded £10,000, or where the value of the succession, together with the value of any other benefit to the successor under the same will or intestacy, exceeded £10,000. Temporary estate duty, like succession duty, is a first charge on the property (*g*). Leaseholds are charged with succession duty (*h*), but neither additional succession duty nor temporary estate duty was payable on a succession to *leasehold* property (*i*).

SECTION 13.

Estate Duty.

Principle of the Finance Act.—The Finance Act, 1894 (*j*), imposed a new duty, called Estate Duty, upon all estates

(*c*) 16 & 17 Vict. c. 51, s. 52.

(*h*) 16 & 17 Vict. c. 51, s. 19.

(*d*) 51 & 52 Vict. c. 8, s. 21.

(*i*) 51 & 52 Vict. c. 8, s. 21, sub-s.

(*e*) *Ib.* s. 21, sub-s. 2.

1 ; 52 Vict. c. 7, s. 6, sub-s. 1.

(*f*) 52 Vict. c. 7, s. 6.

(*j*) 57 & 58 Vict. c. 30.

(*g*) *Ib.* s. 6, sub-s. 6.

exceeding £100 of persons dying after the 1st of August, 1894. The principle on which this Act was founded is, that whenever *property changes hand on death*, the State is entitled to step in and take toll of the property as it passes without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding (*k*).

What the Act has in view for the purposes of taxation is *property passing on death*, not, as in the case of Succession Duty, the *interest of the successor*, and not the interest of the deceased, which if it be a limited interest can never pass (*l*).

On what property Estate Duty is leviable.—The first section of the Finance Act, 1894, contains the pith and substance of the enactment, and, subject to certain exceptions, it imposes estate duty upon the principal value of all property *settled or not settled* which passes on death.

Under this general provision is included the case of the death of the tenant for life of settled property whether or not the tenant for life has assigned his interest during his lifetime. But if the tenant for life has surrendered his interest to the remainderman, or if tenant for life and remainderman in fee combine to sell the settled property, there is no property passing on the death of the tenant for life (*m*).

Property deemed to pass on Death.—In addition to property which *literally* passes on the death of the deceased,

(*k*) See *Cowley's Case*, (1899) A. C. at p. 211. S. 14 of the Finance Act, 1900, is an exception to this general proposition.

(*l*) *Cowley's Case*, (1899) A. C.

at p. 212; and cf. *Hanson on Death Duties*, p. 161.

(*m*) *Att.-Gen. v. Beech*, (1899) A. C. 53.

sect. 2, sub-sect. 1 of the Finance Act, 1894 (which is subsidiary and supplemental to the first section, although classes *a* and *b* do to a certain extent overlap it) and sect. 11 of the Finance Act, 1900, add certain classes of property which for the purposes of the Finance Acts are to be *deemed* to pass on the death.

These classes are five in number, viz.:

- A "Property of which the deceased was at the time of his death competent to dispose" (*n*). This clause provides for the case of general powers of appointment whether such powers are exercised by the deceased or not (*o*).
- B Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cessor of such interests" (*p*). This clause is intended primarily to provide for the case of determinable charges (*q*).
- C Property which would be liable to account duty, if the statutory provisions relating to account duty (*r*) extended to real as well as personal property, and were not restricted to voluntary settlements. This last class includes (i) property disposed of by the deceased by way of gift, however effected, or by marriage settlement, within twelve

(*n*) 57 & 58 Vict. c. 30, s. 2, sub-s. 1 (a).

(*p*) 57 & 58 Vict. c. 30, s. 2, sub-s. 1 (b).

(*o*) *Earl Cowley v. Inland Revenue*, (1899) A. C., at p. 213; see also *Re Scott*, (1900) 1 Q. B. 372.

(*q*) 1899, A. C., at pp. 214 & 221.

(*r*) 44 & 45 Vict. c. 12, s. 88.

months of his death, or at any time if possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise (s); (ii) property formerly belonging to the deceased, which he has transferred to himself and some other person, so that on the death of the deceased it passes by survivorship to such other person; and (iii) property settled by the deceased in such a way that an interest for any period determinable by reference to death, or a power of revocation, is reserved to the settlor.

D "Any annuity or other interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased" (t).

E An estate or interest surrendered to the person entitled in remainder or reversion unless the surrender was made *twelve months* before the death of the deceased, and *bond fide* possession and enjoyment of the property was assumed thereunder immediately upon the surrender, to the entire exclusion of

(s) Cf. 57 & 58 Vict. c. 30, s. 2,
sub-s. 3.

(t) 57 & 58 Vict. c. 30, s. 2,
sub-s. 1 (d).

the person who had the estate or interest (*u*).

Rate of Duty.—The rate of estate duty increases from one up to eight per cent., according to the value of the estate (*v*). For determining this rate all property existing at the death of the deceased, in respect of which estate duty is leviable, is *aggregated* so as to form one estate on the principal value of which the duty is levied. The exceptions to the rule as to aggregation are:—

- (1.) **Non-aggregable Property.**—Property in which the deceased never had an interest (*w*).
- (2.) When the net value of the real and personal property in respect of which estate duty is payable on the death of the deceased, *exclusive* of property settled otherwise than his will, does not exceed £1000, that real and personal property is not aggregated (*x*).
- (3.) Scientific or artistic collections of public interest (*y*).
- (4.) Prior to the Finance Act, 1900 (*z*), there was also an exception as to property which under a disposition not made by the deceased, passed on his death to some person other than wife, husband, lineal ancestor or descendant, e.g., where the deceased was tenant for life of an estate with remainder to his brother. This

(*u*) 63 Vict. Ch. 7, s. 11. This only applies in the case of deaths after 31st March, 1900, and is intended to meet the decision in *Att.-Gen. v. De Preville*, (1900) 1 Q. B. 223.

(*v*) 57 & 58 Vict. c. 30, s. 17.

(*w*) *Ib.* s. 4.

(*x*) *Ib.* s. 16, sub-s. 3.

(*y*) 59 & 60 Vict. c. 28, s. 20.

(*z*) 63 Vict. c. 7, s. 12.

exception is now abolished, except as against *bond fide* purchasers of the estate in remainder prior to the 9th April, 1900.

Settlement Duty.—Settled property upon which estate duty has been paid since the settlement is not liable to any further estate duty until the death of some person who is competent to dispose of the property. A duty, however, called SETTLEMENT ESTATE DUTY is payable on settled property chargeable with estate duty if it passes to some person not competent to dispose of it; but settlement estate duty is payable only once during the continuance of the settlement (*a*).

By whom payable.—Estate duty is a first charge on real property in respect of which it is leviable (*b*).

The executor is accountable for the estate duty on the free personalty of the deceased (*c*).

With regard to all other property, the persons who have a beneficial interest in, or the management of, or the possession of such property, are accountable for the duty (*d*). But a *bond fide* purchaser for value *without notice* is freed from all liability (*e*).

The duty on property passing to the executor as such is payable out of the general personal estate. But where legacies or shares of residuc are settled, the settlement estate duty must be borne by the settled legacy or share of residue (*f*).

(*a*) 57 & 58 Vict. c. 30, s. 5.

Vict. c. 28), s. 19, passed in conse-

(*b*) *Ib.* s. 9, sub-s. 1.

quence of the decision in *Gribble v. Webber*, (1896) 1 Ch. 914, but this

(*c*) *Ib.* s. 6, sub-s. 2.

decision has since been overruled in

(*d*) *Ib.* s. 8, sub-s. 4; s. 9, sub-s. 1.

Re Maryon Wilson, (1900) 1 Ch. 565.

(*e*) *Ib.* s. 8, sub-s. 18; s. 11,

sub-s. 4.

(*f*) Finance Act, 1896 (59 & 60

Where a person is entitled to a charge on property passing on the death of the deceased, other than his free personality, such person must repay to the person paying the duty a proportionate part of the same (*g*). As the duty here includes both estate duty and settlement estate duty, the liability of the person having the charge appears to be greater if the property charged is settled than if it is not. For instance, if A. charges his estate with a jointure of £200 in favqr of his wife, and devises the estate so charged in strict settlement, the jointress will have to contribute rateably both to the estate duty and to the settlement estate duty.

Property subject to estate duty is not liable to additional succession duty, temporary estate duty, or one per cent. succession duty (*h*).

(*g*) 57 & 58 Vict. c. 30, s. 14, (*h*) *Ib.* s. 1.
sub-s. 1.

PART IV.

OF INVESTIGATION OF TITLE AND CONDITIONS RESTRICTING THE SAME.

CHAPTER XI.

EVIDENCE OF TITLE.

HAVING considered the incidents likely to suggest themselves upon an investigation of title, we have now to ascertain the necessary evidence to be adduced in support thereof.

Intestacy is sufficiently proved by production of the letters of administration.

A Will may now be evidenced, with reference to both real and personal property, by production of the probate, or an official copy (*a*). Previously to the Act amending the law relating to probates and letters of administration, probate of a will, though usually accepted as sufficient evidence, was, in strictness, inadmissible (*b*).

Identity of Parcels, if not sufficiently apparent from the

(*a*) 20 & 21 Vict. c. 77, s. 64.

(*b*) 4 Jam. Con. by S. 178.

plans and descriptions contained in the abstracted deeds, must be proved by a statutory declaration of an old inhabitant.

Abstracted Deeds are usually proved by production of the originals. When it becomes necessary to prove them in the course of any judicial proceeding, they are proved by one of the attesting witnesses (*c*), unless such deeds are thirty years old and come from the proper custody, when the observance of all due formalities on their execution will be assumed without further proof. Documents are said to be in proper custody if they are in possession of the person with whom they would naturally be, and if any custody is proved to have had a legitimate origin, or the circumstances of the case render such an origin probable, it will not be considered improper (*d*).

Stamp and Receipt.—The stamps should be examined, and it should be seen that all necessary parties have executed and that their signatures are attested; and as to deeds executed before the Conveyancing and Law of Property Act, 1881, if a money payment be the consideration, or form part of the consideration for their execution, a receipt should be indorsed upon or accompany the deed, the signature whereof should also be attested; but as to deeds executed after the commencement of the Act, *i.e.*, the 1st January, 1882, it is provided, by sect. 55, that a receipt in the body of the deed will be sufficient evidence of payment unless the purchaser has notice that the consideration money has not in fact been paid.

(*c*) But under the Law of Evidence Act, 1865, 28 & 29 Vict. c. 18, s. 7, the witness need not be called in the case of instruments of which attestation is not requisite.

(*d*) Best on Ev. s. 220.

Date.—Where a document bears a date, it will be presumed to have been executed on the day of such date, and if more deeds of a series than one bear date on the same day they will be presumed to have been executed in the order necessary to effect the object intended to be attained (*e*) ; and where a document purporting to be a deed appears to have been signed and attested, it will be presumed to have been sealed and delivered, although no impress of a seal may appear (*f*).

Alterations and Interlineations appearing in a deed are, in the absence of evidence to the contrary, presumed to have been made before the deed was executed (*g*) ; though it is the reverse with regard to alterations and interlineations in wills (*h*).

Lost Deed.—When a deed has been lost or destroyed, it is necessary for the vendor to supply (1) sufficient evidence of the loss, and (2) sufficient evidence of the contents, execution, and stamping of the lost deed. The vendor must prove that every reasonable search for the document has been made (*i*) ; and the secondary evidence must be *clear and cogent* so that the purchaser may maintain his title against all those who may attack him when he is in possession, and so that he may pass on the title in the ordinary way in the market to a purchaser or a mortgagee (*j*). There is a presumption that a lost deed

(*e*) Best on Ev. s. 403.

N. S. 136.

(*f*) *Hall v. Bainbridge*, 12 Q. B. 699.

(*i*) *Hart v. Hart*, 1 Hare 1; Dart, V. & P., p. 159; *Hawker v. King*, L. T. newspaper, April 7, 1900.

(*g*) *Doe v. Catamore*, 16 Q. B. 745.

(*j*) *Halifax Commercial Bank v. Wood*, 79 L. T. 536.

(*h*) *Simmons v. Rudall*, 1 Sim.,

was duly stamped, but this presumption may be rebutted (*k*).

The recital of a deed is evidence of its existence as against the parties executing the deed in which it is recited and those claiming under them, but not of its contents, unless its loss or destruction be proved (*l*).

Surrender and Admittance to copyhold land must be proved by examined copies of the Court roll.

Execution by Attorney.—Should a deed be executed by attorney, the power should be produced (*m*). The same rule applies to the surrender of copyholds by attorney, but not, of course, to an admission. A power of attorney executed abroad in any part of Her Majesty's dominions should be executed before a Notary Public and certified under his seal (*mm*). If the instrument creating the power was executed before the 1st January, 1883, evidence must be furnished that the donor was alive, and was not a bankrupt at the time of its being acted on (*n*). A trustee, executor, or administrator making a payment or doing an act *bond fide* under a power of attorney is not liable for the moneys paid or the act done by reason of the fact that the grantor was dead or had avoided the power, if at the time the power was exercised such trustee, executor, or administrator was not aware of the death of the grantor or the avoidance by him of the power (*o*) ; and the Conveyancing and Law of Property Act, 1881, sect. 47, provides that after the 1st January, 1882, any person making or

(*k*) *Marine Investment Co. v. Haviside*, 5 L. R., H. L. 642.

531, 532.

(*l*) *Burton's Comp.* 478.

(*n*) *Re Oriental Bank*, 28 C. I.D. 640; *Pulling on Attorneys*, 3rd ed. p. 121.

(*m*) *Re Airey*, (1897) 1 Ch. 164.
(*mm*) R. S. C. Order 38, rule 6,
and see *Annual Practice*, 1901, pp.

22 and 28 Vict. c. 35, s. 26.

doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

This section seems to enable an attorney to give a valid discharge for the purchase-money to a purchaser without notice, but it does not enable him to pass the legal estate.

Powers of attorney executed since the 1st January, 1883, are valid and effectual in favour of a purchaser if they are either given for valuable consideration and expressed to be irrevocable, or, although not given for valuable consideration, are expressed to be *irrevocable for a fixed term not exceeding one year*, unless the power has been revoked by the donor with the concurrence of the donee (*p*).

Sect. 48 of the Conveyancing Act, 1881, provides for the deposit of original instruments creating powers of attorney in the Central Office of the Supreme Court of Judicature, upon their execution being verified by affidavit, statutory declaration, or other sufficient evidence, and for the inspection and furnishing of office copies thereof.

Enrolled Deeds may be evidenced by production of certified copies of the originals, if such originals are not in the possession of the vendor; but if in the possession of the vendor, the originals should be produced. The fact of enrolment is proved by the indorsed certificate (*q*).

(*p*) Conveyancing Act, 1882, ss. 8 and 9. (*q*) 12 & 13 Vict. c. 109, s. 18.

Fines are proved by the production of the chirograph, or an exemplification under the seal of the Court, or an examined copy proved by the oath of the examiner (*r*). A recovery is proved by an exemplification or a copy examined with the roll (*s*).

Birth and Marriage.—The facts of *birth* and *marriage* can be proved by certified extracts from the parochial registers, or from the general register established by 6 & 7 Will. IV. c. 86.

Death is sufficiently evidenced by the probate of the will, or letters of administration of the deceased. It may also be proved in the same manner as birth and marriage, or by certified copies from the burial registers established by the Burial Act, 1853 (*t*).

Heirship.—When a title depends on a claim by descent, the *pedigree* must be proved by certificates of birth, marriage, and death of persons through whom the claim is traced, and who, if living, would have been entitled, and by the wills and grants of administration of persons whose devisees would have been entitled before the heir, to show that these persons left no such devisees. In the absence of sufficient evidence of this nature, it must be completed by extracts from deeds or wills of relations, and extracts from parish books, family bibles, old books and papers, inscriptions on tombstones, or declarations of competent persons (*u*); and proof of failure of issue must be shown to verify a pedigree where prior estates are alleged not to have vested for default of such issue.

Failure of Issue is a negative fact which is difficult

(*r*) Burton's Comp. 486.

(*s*) *Ib.* 490.

(*t*) 16 & 17 Vict. c. 134, s. 8.

(*u*) Prid. Con. tit. "Abstract"; see also *Howarth v. Smith*, 6 Sim.

171.

to prove. Proof may consist of evidence of celibacy, grant of administration to distant relations, family reputation, or evidence of living witnesses (*w*). A title may occasionally depend upon a female being *past child-bearing*. This is usually presumed when the female is 53 years of age, but it has been presumed on medical evidence at 49 (*x*). It has, however, been held with reference to the Rule against Perpetuities that the Court will not consider a woman, however old, as incapable of bearing children (*y*).

Seisin may be presumed from facts tending to show that the ancestor or testator appeared to be the owner, such as by production of leases granted by him under which possession has been taken by the lessee (*z*), and by grant of an annuity by a person in possession, which stated that a certain person was the legal owner of the fee (*a*), or by production of receipts for rent given to persons proved to have been in the occupation of the premises, or by the declaration of such occupiers, that they held of the party whose possession is sought to be proved; but occupation, although sufficient to raise a presumption of title in ejectment, does not have that effect as between vendor and purchaser (*b*).

Recitals.—The Vendor and Purchaser Act, 1874 (*c*), provides that *recitals*, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts

(*w*) Dart, p. 390.

(*a*) *Doe v. Coulthred*, 7 Ad. & El.

(*x*) *Re Millner*, 14 Eq. 245.

235.

(*y*) *Re Dawson*, 39 C. D. 155.

(*b*) *Doe v. Penfold*, 8 Car. & P.

(*z*) *Clarkson v. Woodhouse*, 5 T.

536; see also 13 Ves. 122.

R. 412; *Welcome v. Upton*, 6 M. &
W. 536.

(*c*) 37 & 38 Vict. c. 78, s. 2,
r. 2.

of Parliament or statutory declarations twenty years old at the date of a contract should, unless and except so far as they should be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions. So that recital of seisin of a particular person in a deed twenty years old, in the absence of proof to the contrary, would be evidence thereof; and it is a very common practice to introduce such recitals in conveyances and mortgages with that view. And the Conveyancing Act, 1881, sect. 3, sub-sect. 3, provides that it shall be assumed, unless the contrary appears, that recitals, contained in abstracted instruments, of any deed, will, or other document, forming part of a title prior to the time prescribed by law or stipulated for the commencement of title are correct, and give all material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, inrolment or otherwise.

Acts of Parliament.—A Queen's printers' copy of an *Act of Parliament* should be produced for evidencing title derived under such a document; and the statute 8 & 9 Vict. c. 113, sect. 3, renders it unnecessary to prove that the copy so produced was printed by the Queen's printers.

By the Documentary Evidence Act, 1882 (*d*), a copy of an *Act* purporting to issue out of Her Majesty's Stationery Office is equally admissible. Private *Acts*, not printed by the Queen's printers, must be proved by examined copies.

Orders of the Court are proved by examining the originals, or by office copies, and it is conceived that the vendor is bound, if required to do so, to produce an office copy at the purchaser's expense (*e*). Sect. 70 of the Conveyancing Act, 1881, which provides that an order of the Court under any statutory or other jurisdiction "shall not as against a purchaser be invalidated on the grounds of (*inter alia*) want of jurisdiction," does not operate to give a good title to a purchaser at a sale under an order of the Court, when the Court by inadvertence deals with the interest of a person not a party to the proceedings (*ee*).

An Inclosure Award is proved by examination of the copy which under sect. 146 of the Inclosure Act, 1845 (*f*), has to be deposited with the clerk of the peace of the county in which the lands enclosed are situate.

Leaseholds.—On the sale of *leasehold* property, the purchaser is bound to assume that the lease has been duly granted, unless the contrary appears (*g*). Leaseholds which have been specifically bequeathed vest in the legatee absolutely upon the assent of the executor (*h*), and it has been held that this rule also applies to a residuary bequest (*i*). If the legatee is selling, evidence must be furnished that the executor has assented to the bequest (*j*); but if the executor is selling to pay debts, the purchaser

(*e*) *Dart, V. & P.*, p. 472.

(*ee*) *Jones v. Barnett*, (1900) 1 Ch. 370.

(*f*) 8 & 9 Vict. c. 118.

(*g*) Conveyancing Act, 1881, s. 3, sub-ss. 4 and 5.

(*h*) *In re Culverhouse*, (1896) 2

Ch. 251.

(*i*) *Austin v. Beddoe*, 41 W. R. 620.

(*j*) As to evidence of assent, see *Cole v. Miles*, 10 Hare, 179; *Fenton v. Clegg*, 9 Ex. 680.

may assume that there has been no assent unless the legatee is in possession (*k*).

Performance of Covenants.—The receipt for the last payment due for rent under the lease before the date of actual completion must be produced by the vendor as evidence that the covenants in the lease have been duly performed (*kk*). In this connection it may be mentioned that the Courts of Equity, under their original jurisdiction, have always relieved against forfeiture of a lease for non-payment of rent, and in cases of breach of covenant due to fraud, accident, or mistake, but not if the breach is due to mere forgetfulness on the part of the lessee (*l*). It is provided by the Conveyancing Act, 1881, sect. 14, sub-sect. 1, that a right of re-entry or forfeiture under any stipulation in a lease, for a breach of covenant or condition, shall not be enforceable until the lessor serves on the lessee a notice specifying the breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the same, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy it, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach. By sub-sect. 2 of the same section, the Court has a statutory power to give relief to the lessee, "having regard to the proceedings and conduct of the parties under the foregoing provisions of this section,

(*k*) *Venn and Furze's Contract*,
(1894) 2 Ch. 102.

(*l*) *Barrow v. Isaacs & Son*
(1891) 1 Q. B. 417.

(*kk*) See *infra*, p. 258.

and to all other circumstances." Sect. 4 of the Conveyancing Act, 1892 (*m*), provides for the protection of *underlessees* in the event of forfeiture of the head lease. But these provisions do not extend to a covenant or condition against assigning, underletting or parting with the possession or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest where a year has expired from the date of the bankruptcy or taking in execution, and the lessee's interest has not been sold (*n*).

Appointments.—We have seen that, under the Wills Act (*o*), an *appointment by will* executed according to the formalities prescribed by the Act, so far as respects the execution and attestation thereof, is a valid execution of the power, notwithstanding the observance of other formalities may have been required by the document creating the power; and by Lord St Leonards' Act (*p*), a deed executed thereafter in the presence of two or more witnesses in the manner in which deeds are usually executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power by deed or instrument not testamentary, notwithstanding that such deed or instrument may require some other form of execution; but with reference to appointments executed prior to these Acts, it is necessary that the prescribed formalities should have been observed. It should, however, be borne in mind that Equity will aid

(*m*) 55 & 56 Vict. c. 13; see C. A. 1892, s. 2, sub-s. 2.
article in 41 Sol. J., p. 775. (*o*) 1 Vict. c. 26.

(*n*) C. A. 1881, s. 14 sub-s. 6; (*p*) 22 & 23 Vict. c. 35, s. 12.

the defective exercise of a power in favour of a purchaser, mortgagee, creditor, wife, child, or a charity (*pp*).

Bankruptcy Proceedings.—The Bankruptcy Act, 1883 (*q*), provides, that petitions, orders, certificates, deeds and other instruments, or copies of them, and affidavits or documents made or used in the course of any bankruptcy proceedings, are to be receivable in evidence if under the seal of the Court, or purporting to be signed by any judge having jurisdiction in bankruptcy (*r*); a copy of the *London Gazette* containing any notice of a receiving order or order of adjudication is conclusive evidence of such orders having been duly made and of their date (*s*). When, therefore, the title depends upon bankruptcy, the abstract should be verified accordingly.

Redemption of Land Tax.—Where property is sold as free from *land tax*, the redemption of the land tax should be shown by production of the certificate of the land tax commissioners, or an official extract from the register which is kept at the Land Tax Redemption Office (*t*).

Acknowledgments.—An *acknowledgment* by a married woman may be proved by an office copy of the certificate filed in the proper office of the Supreme Court of Judicature where an index of such acknowledgments is kept (*u*). In the case of acknowledgments since 31st December, 1882, no certificate is necessary, and a memorandum of acknowledgment indorsed on the deed is sufficient.

(*pp*) *Tollet v. Tollet*, Wh. and T.L.C., Vol. II.

(*q*) 46 & 47 Vict. c. 52.

(*r*) *Ib.* s. 134.

(*s*) *Ib.* s. 132.

(*t*) See *Buchanan v. Poppleton*, 4 Jur., N. S. 414.

(*u*) Conveyancing Act, 1882, s. 7, sub-s. 8.

Discharge of Legacies, &c.—The *discharge of a legacy* is proved by the release or receipt of the legatee, and a discharge of portions by the release of the portionists; but the purchaser should satisfy himself that the legatee or portionist was *sui juris* at the time of making such release. *The cesser of a jointure* or annuity must be evidenced by proving the death of the jointress or annuitant, and the receipt by his or her legal personal representatives for the last payment due.

Discharges for legacies or other sums charged upon land must be produced, notwithstanding twelve years may have elapsed since they became payable, as the claims may still subsist in consequence of incompetency of the person entitled, or an intermediate acknowledgment may have been given (v).

Payment of Duties.—Payment of *succession duty* and *temporary estate duty* must be proved by the receipt of the Inland Revenue Office or certificate of payment (w). But if the succession took place more than twelve years ago, the land is discharged from succession duty as against a purchaser for valuable consideration (x). As between vendor and purchaser, where land is sold free from incumbrances, the vendor is liable for unpaid succession duty (y). Payment of **ESTATE DUTY** must be proved by the certificate of discharge of the Commissioners of Inland Revenue, or by the receipt of the Inland Revenue Office (z).

- (v) 37 & 38 Vict. c. 57, s. 8; see also *Cooke v. Soltan*, 2 Sim. & Stu. 154.
- (w) 16 & 17 Vict. c. 51, s. 52; see also *Earl Howe v. Earl of Lich-*
- field, 2 Ch. 155.
- (x) 52 Vict. c. 7, s. 12.
- (y) *Kidd and Gibbons' Contract*, (1893) 1 Ch. 695.
- (z) 57 & 58 Vict. c. 30, s. 11.

Registration of Title is evidenced by notice of registration marked on the title-deeds (*a*) ; but in any case the land certificate must be produced. Where only part of registered land is sold, the certificate must be produced at the vendor's expense (*b*).

Presumptions of Fact.—A seller cannot himself prove a fact upon which the title depends (*c*), though in practice a purchaser is frequently content to take a statutory declaration by a vendor as evidence of facts within his knowledge.

In the absence of or deficiency in proof of the existence or due execution of material instruments, presumption that such instruments did exist and were duly executed was always admissible as between vendor and purchaser if possession had been consistent with the *prima facie* title. And, as a general rule, a purchaser would be bound to admit all matters which a judge in a Court of law would direct the jury to presume, though not such matters as would be left to the finding of the jury. The same rule also would seem to apply to matters of fact as between vendor and purchaser. (See Mr Dart's elaborate dissertation on presumptions and the cases there cited, Dart's *Vendors and Purchasers*, tit. "Abstract"). And now, as we have seen before, under the Vendor and Purchaser Act, 1874 (sect. 2, sub-sect. 2), recitals twenty years old at the date of the contract, unless proved to be inaccurate, are to be taken as correct ; and under the Conveyancing Act, 1881 (sect. 3, sub-sect. 3), recitals in the abstract of documents prior to the root of title are assumed to be accurate.

(*a*) Land Transfer Rules (1898), rule 20.

(*b*) 60 & 61 Vict. c. 65, s. 8.

(*c*) *Hobson v. Bell*, 2 Beav. 17.

CHAPTER XII.
CONDITIONS OF SALE.

SECTION 1.

Time for Completion of Purchase.

AFTER perusing the abstract of the vendor's title and comparing it with the deeds, the purchaser's solicitor will be in a position to prepare his requisitions. In settling those requisitions, regard must be had to the stipulations contained in the contract, and it is therefore convenient at this point to consider the various stipulations which are commonly made.

In whichever mode the sale is effected, the articles of agreement or the conditions of sale should stipulate for the completion of the purchase on a day certain to be named therein; and the time so named, until the Judicature Act, 1873 (*a*), which came into operation on the 1st November, 1875, would at law have been of the essence of the contract.

Time when of the Essence of the Contract.—The Courts of Equity, however, regarded the time fixed for completion as a detail which was only introduced for the sake of convenience to indicate when the parties should come together, and not as an essential part of the contract

(*a*) 36 & 37 Vict. c. 66.

between them. Since the Judicature Act, the rules of equity prevail, but nevertheless the tendency of modern decisions has been to regard time as material. Thus, exceptions have been engrafted on the general rule, and the time fixed is of the essence of the contract where, from the circumstances of the case, it must have been so in the contemplation of the parties. As instances of these exceptions may be mentioned the sale of a public-house (*b*), or of property of a determinable or wasting character; so, too, where the property is required for some *immediate purpose*, such as trade or manufacture (*c*), or the residence of the purchaser (*d*).

Time may become of the essence of the contract by the *express agreement* of the contracting parties, as where it is actually stated to be so in the conditions of sale, or where it is provided that possession shall be given by a certain day (*e*). But the fact that the contract fixes a day for completion, and provides that, if the purchase is not completed on that day, the purchaser shall pay interest, does not render time an essential condition of the contract (*f*).

Where no time fixed.—A contract for the sale and purchase of land may be enforced, although no time for completion is fixed (*g*). The vendor in such a case is entitled to a reasonable time for making out his title (*h*).

In cases where no time has been fixed, or where the

(*b*) *Costake v. Till*, 1 Russ. 376,
and see *Warren v. Moore*, 14 T. L.
R. 188, and cases there cited.

(*c*) *Parkin v. Thorold*, 16 Beav.
65.

(*d*) *Compton v. Bagley*, (1892) 1
Ch. at p. 318.

(*e*) *Tilley v. Thomas*, 3 Ch. 61.

(*f*) *Hatton v. Russell*, 38 C. D.
334.

(*g*) *Gray v. Smith*, 43 C. D. 214.

(*h*) *Simpson v. Hughes*, 76 L. T.
238.

time fixed is not of the essence of the contract, if either party is guilty of unnecessary delay, the proper course for the other contracting party is to serve a notice fixing a reasonable time within which the contract must be completed (*i*). The time so limited will be considered by the Court as having become of the essence of the contract. The question of what is a reasonable time must, of course, depend on the circumstances of each case, and the notice should fix the longest time that can reasonably be required for the performance of the acts that remain to be done (*j*). In one case where the title had been accepted and the terms of the draft conveyance agreed upon, a ten days' notice given by the vendor was held to be sufficient (*k*). It must be borne in mind that a notice of this kind is not effectual unless the delay arises from improper conduct on the part of the other contracting party (*l*).

SECTION 2.

Interest on Purchase-Money.

When Interest becomes payable.—It is the ordinary rule as between vendor and purchaser that after the time fixed for completion the vendor is entitled to interest, and the purchaser to rents and profits (*m*). Where no time is fixed for completion, the vendor is entitled to interest from the time when a good title has been shown, and the purchaser might prudently take possession (*n*).

(*i*) *King v. Wilson*, 6 Beav. 124.

(*m*) *Fry on Specific Performance*,

(*j*) *Crawford v. Toogood*, 13 C. D.

p. 621.

153.

(*k*) *Smith v. Batsford*, 76 L.T. 179.

(*n*) *Re Spencer-Bell*, 33 W. R.

(*l*) *Green v. Sevin*, 13 C. D. 589.

771; *Re Keeble and Stillwell*, 78 L.

T. 383.

The conditions usually provide for payment of interest by the purchaser "if from any cause whatever, *other than wilful default* on the part of the vendor," the purchase is not completed by the time fixed. To escape from payment of interest under this clause, the purchaser must show, first, that the vendor was guilty of wilful default, and, secondly, that the cause of the contract not being completed by conveyance on the day named, was this wilful default on the part of the vendor (*o*).

Wilful Default.—“Default” would appear to signify that the vendor has left undone something which he ought to have done; while “wilful” amounts to nothing more than that he knew what he was doing, and intended to do what he was doing, and was a free agent (*p*). Lindley, L. J., in a recent case, stated the law to be now settled that “moral delinquency, intentional delay, wilful obstruction on the part of the vendor may all be absent, and yet there may be wilful default on his part disentitling him to interest” (*q*). Thus, where the vendor went abroad for a holiday two days before the time fixed for completion (*r*), where, under a mistake of law, he omitted to obtain a conveyance from one of two trustee-mortgagees (*s*), where he neglected to take steps to procure admission to copyholds (*t*), or to obtain the concurrence of necessary parties (*u*), and where, owing to a misinter-

(*o*) *In re Mayor of London and Tubbs*, (1894) 2 Ch. 524.

(*p*) *Per Bowen*, L. J., in *Young and Harston's Contract*, 31 C. D. 168, at p. 175.

(*q*) *In re Hetling and Merton's Contract*, (1893) 3 Ch. 269, at p. 281.

(*r*) *Young and Harston's Contract, supra.*

(*s*) *In re Hetling and Merton's Contract, supra.*

(*t*) *Wilson and Stevens' Contract, (1894) 3 Ch. 546.*

(*u*) *In re Earl of Strafford and Maples*, (1896) 1 Ch. 285.

pretation of the conditions of sale, he refused to deliver an abstract of title (*v*), he has in each case been held guilty of wilful default. On the other hand, mere forgetfulness or an honest mistake of fact is not wilful default. "To make up one's mind not to verify a statement is wilful, but simply not to think about verifying it is not wilful" (*w*).

In a recent case, when the words were "if from any cause whatever other than the *default* of the vendor"—the word "wilful" being omitted—the Court of Appeal held nevertheless that default must be construed as meaning wilful default, and not in the sense of mere failure to perform (*x*).

Where the condition is in an unqualified form—to pay interest whatever the cause of delay may be—as in the case of *Williams v. Glenton* (*y*), there seems some authority for holding that it is necessary to prove wilful delay or want of *bond fides*, on the part of the vendor (*z*). Probably, however, the distinction is of little importance, and the Court would in no case allow the vendor to obtain interest, if he is himself to blame (*a*).

What is not Default.—The rule is now clearly established, that when a time for completion is fixed, the mere fact that the abstract delivered is at first defective, or that delay is caused by the state of the title and difficulties respecting the title, will not relieve the purchaser from payment of interest. This rule was estab-

(*v*) *Re Pelly and Jacob*, 80 L. T.

(*y*) 1 Ch. 208.

45.

(*z*) *Esdaile v. Stephenson*, 1 S. &

(*w*) *In re Mayor of London and Tubbs' Contract*, (1894) 2 Ch. at p. 536.

S. 122; *Re Helling and Merton*, (1898) 3 Ch. at p. 281.

(*x*) *Re Woods and Lewis*, (1898), 2 Ch. 211.

(*a*) *Re Woods and Lewis*, (1898) 1 Ch. at p. 436; (1898) 2 Ch. 213.

lished by the leading case of *Sherwin v. Shakspear* (*b*) approved by the Court of Appeal in *Williams v. Glenton* (*c*), and in *Mayor of London and Tubbs' Contract* (*d*), and followed in *Vickers v. Hands* (*e*), and *Palmerston v. Turner* (*f*). If however the vendor, knowing that there is a defect in his title, fixes a day for completion which is not a reasonable time, *having regard to the difficulties which he knows he has to deal with*, it is submitted that this would be held to be wilful default on the part of the vendor (*g*). In one case it has been held that wilful default means "obstruction in the *completion* of the contract," and that if the vendor repudiates the contract altogether, and resists a specific performance action unsuccessfully, he is, nevertheless, entitled to interest on the purchase money (*gg*).

How Payment of Interest can be evaded.—There is some conflict of authority as to how far the purchaser can escape liability to pay interest, by depositing the purchase-money at a banker's, and giving the vendor the benefit of the deposit interest. It was formerly considered that the purchaser might be discharged in this way, even in the case of an express condition to pay interest. Lord Romilly, however, in *Vickers v. Hands* (*h*), held the purchaser liable, notwithstanding such appropriation; and the careful judgment of North J. in *Riley v. Streatfield* (*i*), is generally considered to have settled this point against the purchaser.

(*b*) 5 De. G. M. & G. 517.

(1898) 2 Ch. at pp. 213 and 215.

(*c*) 1 Ch. 206.

(*gg*) *North v. Percival*, (1898)

(*d*) 1894, 2 Ch. 535.

2 Ch. at p. 135, *sed quare*.

(*e*) 26 Beav. 630.

(*h*) 26 Beav. 630.

(*f*) 33 Beav. 524.

(*i*) 34 C. D. 386.

(*g*) See *Ire Woods and Lewis*,

Where, however, there is *no express stipulation* as to interest, and the vendor's claim depends on the ordinary rule of the Court, which gives the vendor interest at £4 per cent. as from the day fixed for completion, it is submitted that the purchaser may discharge himself from liability, by appropriating the purchase-money, and giving the vendor notice (*j*).

SECTION 3.

Deposit.

It is usual to stipulate by the contract for a deposit by the purchaser. The deposit serves two purposes, viz., as part payment of the purchase-money if the sale is carried out, and also, which is its primary object, as a guarantee that the purchaser *means business*. In sales by auction the conditions usually provide that the deposit shall be paid to the auctioneer, and until the purchase is completed he is a mere stakeholder, and must not part with it without the consent of both vendor and purchaser. The rule does not, however, apply in the event of the solicitor for the vendor receiving the deposit, and should he receive it as agent for the vendor, he must pay it over to him on demand (*k*). An auctioneer is justified in accepting a cheque in payment of deposit (*l*), but he is under no obligation so to do (*m*).

(*j*) See *Winter v. Blades*, 2 S. & S. 393; *Dyson v. Hornby*, 4 De. G. & Sm. 481; *Kershaw v. Kershaw* 9 Eq. 56.

(*k*) *Edgell v. Day*, L. R., 1 C. P. 80; *Ellis v. Goulton*, (1893) 1 Q. B. 350. As to making an auctioneer

defendant to an action for specific performance, see *Egnont v. Smith*, 6 C. D. 469.

(*l*) *Farrer v. Lacey Hartland*, 31 C. D. 42.

(*m*) *Johnston v. Boyes*, (1899) 2 Ch. 73.

Forfeiture of Deposit.—It is usual to provide that, if the purchaser shall neglect to comply with the conditions, such deposit money shall be forfeited to the vendor, who shall be at liberty to resell the property, and that the deficiency in price on such second sale, and the expenses attending the same, shall be made good by the purchaser making default, and, in case of non-payment thereof, the same shall be recoverable as liquidated damages (*n*). This stipulation will entitle the vendor, where the purchaser after accepting the title makes default, to resell the estate and recover the deficiency and expenses from the purchaser (*o*); but if upon a resale the estate were to produce more than the original purchase-money, the purchaser making default could not call for an account of the surplus (*p*). A vendor cannot, however, after a sale at a loss, sue for the original purchase-money, but only for the expenses of the resale and loss (*q*); and it is assumed, that if the contract clearly states that the purchaser making default is to forfeit the deposit, the verdict in an action for breach of the contract would entitle the vendor to the forfeiture stipulated for (*r*); but if the purchaser becomes bankrupt, equity will set off the deposit against any deficiency (*s*) and it is submitted, that if a purchaser, after breaking the condition, becomes bankrupt, and the trustee disclaim under sect. 55, sub-sect. 1, of the Bankruptcy

(*n*) It seems doubtful whether in the absence of express stipulation the vendor has the right to resell the property, see 43 Sol. J. 601.

(*o*) *Soper v. Arnold*, 14 A. C. 429.

(*p*) *Ex parte Hunter*, 6 Ves. jun.

94.

(*q*) *Lamond v. Darvall*, 9 Q. B. 1030.

(*r*) Sugd. V. & P., Ch. I. s. 2 and cases cited. See also *Hinton v Sparks*, L. R., 3 C. P. 161.

(*s*) *Ex parte Hunter*, 6 Ves. 94.

Act, 1883, (*t*), the vendor may retain the deposit and prove under sub-sect. 7 for the expenses of a resale (*u*).

Forfeiture where no Express Provision.—Where there is no provision in the contract for forfeiture of the deposit, such forfeiture will depend upon the intention of the parties, to be collected from the whole instrument (*v*) ; but where the purchaser has so acted as to *repudiate* on his part the contract, he cannot recover the deposit from the vendor (*w*).

Whether, if the purchaser evades performing the contract on the grounds that it is not sufficiently evidenced in writing to satisfy the Statute of Frauds, he can recover his deposit, is a doubtful point, as the authorities are conflicting (*x*).

In an action for specific performance, an alternative claim may be made for a declaration that the vendor is entitled to forfeit the deposit and resell the property ; but the declaration is in the nature of a luxury for which the vendor must pay (*y*).

If the deposit is large in amount its investment between the sale and the completion of the purchase is frequently provided for, in which case the vendor will be entitled to any increase, and must bear any loss in the value of the investment (*z*).

Return of Deposit.—Should the purchase be vacated by

(*t*) 48 & 47 Vict. c. 52.

(*x*) Cf. *Thomas v. Brown*, 1 Q. B.

(*u*) *Ex parte Barrell*, 10 Ch. 512.

D. 714 ; and *Carson v. Roberts*, 31

(*v*) *Palmer v. Temple*, 9 Ad. & E.

Beav. 613.

508.

(*y*) *Kingdon v. Kirk*, 37 C. D.

(*w*) *Howe v. Smith*, 27 C. D. 89 ;

141.

Cornwall v. Henson, (1899) 2 Ch. 715, and (1900) 2 Ch. 298.

(*z*) *Burroughes v. Brown*, 9 Hare, 609.

reason of a defect in the title, the purchaser will be entitled to receive the deposit with interest from the time of payment, together with his costs of investigating the title (*a*), and he will have a lien on the estate for the deposit (*b*) which is not affected by any statute of limitation (*c*).

SECTION 4.

Rescission by the Vendor.

It is now a common condition that if any requisition *as to title* shall be insisted upon by a purchaser, which the vendor shall be unable or unwilling to remove or comply with, he may at any time, notwithstanding any attempt to remove or comply with, or any previous negotiation or litigation in respect of such requisition, by notice in writing annul the sale upon returning the deposit, without interest or costs of investigating title or other compensation.

This condition is construed strictly, and is only applicable to an honest case (*d*).

Objections as to Conveyance.—There is, of course, a clear distinction between requisitions as to *conveyance* and requisitions as to *title*. Requisitions requiring a legal estate or outstanding day of a term to be got in (*e*), re-

(*a*) *Pounsett v. Fuller*, 17 C. B. 660.

(*d*) *Bowman v. Hyland*, 8 C. D. 588.

(*b*) *Rose v. Watson*, 10 H. L. C. 683.

(*e*) *Re Kitchen and Palmer*, 46 L. J. Ch. 611; *Re Deighton and Harris*, (1898) 1 Ch. 458.

(*c*) *Levy v. Stogdon*, (1898) 1 Ch. 487.

quiring the concurrence of mortgagees (*f*), or the appointment of trustees for the purposes of the Settled Land Acts (*g*), are requisitions as to conveyance only. Whenever it is a matter of conveyance and not of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest and also by force of the interests of others whom he can compel to concur in the conveyance (*h*). It has been said that it is not in general proper to make the condition as to rescission apply to requisitions as to conveyance (*i*). But it is now a common practice so to do, and even where the condition does not in terms refer to an objection as to conveyance, if it is expressed to include objections as to "the title, particulars, conditions, or any other matter or thing *relating or incidental* to the sale," this has been held to be sufficient (*j*).

When Right to Rescind arises.—Where the condition enables the vendor to rescind upon the purchaser *insisting* (*k*) upon, or *persisting* (*l*) in, his requisitions, the vendor cannot exercise the power if the purchaser waives his objection at once.

But if the word "make" simply is used, the vendor's right to rescind arises directly the requisitions are sent in, without giving the purchaser any *locus paenitentiae* (*m*).

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| <p>(<i>f</i>) <i>Sober v. Kemp</i>, 6 Hare, 158;
 <i>Greaves v. Wilson</i>, 25 Beav. 290.
 (<i>g</i>) <i>Hatton v. Russell</i>, 38 C. D. 334.
 (<i>h</i>) <i>Bain v. Fothergill</i>, L. R. 7 H. L. at p. 209.
 (<i>i</i>) <i>Hardman v. Child</i>, 28 C. D., at p. 718.
 (<i>j</i>) <i>Re Deighton and Harris</i>,</p> | <p>(1898) 1 Ch. at p. 463.
 (<i>k</i>) <i>Greaves v. Wilson</i>, 25 Beav. 290; <i>Dudell v. Simpson</i>, 2 Ch. 102.
 (<i>l</i>) <i>Maisson v. Fletcher</i>, 6 Ch. 91.
 (<i>m</i>) <i>Starr-Bowkett Building Society and Sibun's Contract</i>, 42 C. D. 375; <i>In re Dames and Wood</i>, 29 C. D. 626.</p> |
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How Right is Lost.—The words “notwithstanding any previous litigation” refer to *pending* litigation.

Thus, where a vendor has taken out a summons under the Vendor and Purchaser Act, 1874, and judgment has been given against him, he cannot subsequently annul the sale under this condition (*n*) ; nor can he rescind if he has elected to insist on specific performance of the contract (*o*).

If the words “judicial decision” were used in addition to “litigation,” the vendor might have this power; but such a condition would be very unfair.

The vendor does not lose his right to rescind merely because a writ or summons has been issued by the purchaser. He must acquiesce in the litigation in order to waive his rights, but the purchaser is entitled to the costs of action up to the time of rescission (*p*).

Where a contract, containing a condition for rescission, provides that any error in the description of the property shall not annul the sale, but shall be the subject of compensation, the purchaser cannot insist upon compensation for a misdescription if the vendor chooses to exercise his right to rescind the contract (*q*).

In exercising the right of rescission the vendor must act *bonâ fide* and not capriciously; but he is not bound to state to the purchaser the reason why he is unwilling or unable to comply with the requisitions (*r*). The option

(*n*) *In re Arbib and Class's Contract*, (1891) 1 Ch. 601.

(*o*) *Gardom v. Lee*, 3 H. & C. 651.

(*p*) *Isaacs v. Towell*, (1898) 2 Ch. 285.

(*q*) *Ashburner v. Sewell*, (1891) 3 Ch. 405; *In re Terry and White's Contract*, 32 C. D. 14.

(*r*) *In re Starr-Bowkett Building Society and Sibun's Contract*, 42 C. D. p. 387.

to rescind must be exercised in reasonable time, and in a recent case, where the vendor tried to play fast and loose with the purchaser while he negotiated with a third party, the purchaser was held entitled to repudiate the contract and recover the deposit with interest at 4 per cent. (s).

SECTION 5.

Delivery of the Abstract and Requisitions.

The contract sometimes provides that the vendor shall, within a time given, *e.g.*, a fortnight, deliver to the purchaser or his solicitor an abstract of the title; but the vendor is bound to deliver such abstract independently of such a condition. Should a time be named for delivery of the abstract it should be delivered accordingly, and at the time of such delivery it should be as perfect as the vendor can make it (t). The non-delivery of a perfect abstract on the day named in the contract would have relieved a purchaser therefrom at law (u), though in equity the purchaser will be bound if he neglect to apply for the abstract within a reasonable time before the day fixed for its delivery (v), or if, upon its being subsequently tendered, he receive it without objection (w); but the wilful default of a vendor to furnish an abstract within the proper time, when requested by the purchaser to do so, will entitle the purchaser in equity to be relieved from the contract when the time fixed for completion has expired (x).

- (s) *Smith v. Wallace*, (1895) 1 *Jones v. Price*, 3 Anst. 924.
Ch. 385. (w) *Smith v. Burnam*, 2 Anst. 527.
(t) *Morley v. Cook*, 2 Ha. III. (x) *Seton v. Slade*, 7 Ves. 265.
(u) *Berry v. Young*, 2 Esp. 640. (y) *Guest v. Homfray*, 5 Ves. 818;

Where no time for the delivery of an abstract is fixed by the conditions, the purchaser should give the vendor notice in writing, limiting a reasonable period within which a proper abstract must be delivered (*y*).

Delivery of Requisitions.

The conditions of sale generally contain a provision that any requisition or objection arising on the abstract particulars or conditions shall be sent in within some specified period, *e.g.*, ten days after the delivery of the abstract, "otherwise the same shall be considered as waived, in which respect time shall be of the essence of the contract." The time so limited must be computed from the delivery of a *perfect* abstract (*z*), and the purchaser is not precluded from raising objections arising out of facts which were not disclosed by the abstract (*a*).

Moreover, if the vendor does not deliver the abstract of title within the time specified in the conditions of sale, he cannot hold the purchaser bound to send in his objections within the time limited for that purpose, even though it was stipulated in the condition for sending in the requisitions that time in that respect should be of the essence of the contract (*b*).

It has also been held that this condition does not apply to the case of a title which is wholly bad, but merely to requirements as to further information or further security which the purchaser might have properly enforced against a vendor who had a valid title or one

- (*y*) *Compton v. Bagley*, (1892) 1 Ch. 318. v. *Fowler*, L. R., 8 Ex. 280.
(*z*) *Blacklow v. Laws*, 2 Hare, 40; (*a*) *Dart*, V. & P. p. 180.
Hobson v. Bell, 2 Beav. 17; *Gray* 436. (*b*) *Upperton v. Nicholson*, 6 Ch.

capable of being made valid (*c*). The condition does not prevent the purchaser from raising an objection which goes to the root of the whole matter, and cannot be used for forcing a bad title on the purchaser because he has not taken the objection to matters of title within the time limited (*d*). If, however, the requisition does not go to the root of title, it cannot be taken after the time limited by the condition (*e*), and in every case the purchaser should avoid unnecessary delay in delivering his requisitions.

SECTION 6.

Condition as to Compensation.

It is usual to insert a stipulation in the conditions that, if any mistake shall be made in the description of the property, or any other error whatever shall appear in the particulars, such mistake or error shall not vitiate or annul the sale, but shall be the subject of compensation to be settled by arbitration. Where there is a condition of this character, compensation can be obtained by the purchaser, even after a conveyance has been executed (*f*). In the absence of express stipulation, however, compensation for a misdescription is only allowed prior to completion (*g*).

A wilful misdescription in the particulars amounting to fraud avoids the contract altogether (*h*).

(*c*) *Want v. Stallibrass*, L. R., 8 Ex. 185.

(*d*) *Re Tanqueray Willaume and Landau*, 20 C. D. at p. 473; *Saxby v. Thomas*, 63 L. T. 695.

(*e*) *Re Thompson and Curzon*, 52 L. T. 498.

(*f*) *Palmer v. Johnson*, 13 Q. B. D. 351.

(*g*) *Clayton v. Leech*, 41 C. D. 103.

(*h*) *Dart, V. & P.* 151; *Dimmock v. Hallett*, 2 Ch. 21, as explained by Lindley, L. J., in *Terry and White's Contract*, 32 C. D. 29.

In the absence of fraud, however, it is often a difficult question whether a misdescription justifies the rescission of the contract, or is merely the subject of compensation.

Cases in which the Condition does not apply.—In *Flight v. Booth* (*i*), which may be considered the leading case on this subject, Tindal, C. J., laid down the law as follows:—“Where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased the thing which was really the subject of the sale.”

In *Flight v. Booth* the plaintiff had contracted to purchase leasehold premises in Covent Garden, and it was stated in the particulars that, by a clause in the lease, no *offensive* trade was to be carried on on the premises. The restriction referred to really extended to many trades of a perfectly *inoffensive* character, and the misdescription was held to be fatal. The vendor cannot treat the existence of undisclosed *restrictive covenants* as coming within the condition as to compensation, except in the case of a sale to a school-board, which is not bound by the restrictions, but is liable to pay compensation to the covenantee under sect. 68 of the Lands Clauses Act (*j*). It is almost impossible to assess compensation

(*i*) 1 Bing. N. C. 370.

Harrogate, (1896) 1 Ch. 437.

(*j*) *Kirby v. School Board for*

for covenants of this nature (*k*), but it is presumed that if the purchaser chooses to treat the defect as coming within the condition, he is entitled to do so (*l*), although, when there is no condition as to compensation, he must either repudiate the contract or pay the full purchase price (*m*).

In *Jones v. Edney* (*n*), a public-house, which was the subject-matter of the sale, was described in the particulars as "free," whereas it was in reality a tied house, and the contract was held to be avoided.

Again, in the case of *In re Arnold* (*o*) the vendor contracted to sell a farm, and an important close comprised in the farm was described in the particulars as a field of four acres, and was marked on the plan as a separate field. It appeared, however, that the vendor only possessed four undivided sevenths of a seven-acre field. The purchaser was released from his bargain, for a man cannot be obliged to take a thing with compensation when the thing is substantially and materially different from that which he was induced by the representations made to him to believe that he had bought. A similar decision was arrived at in *Dobell v. Hutchinson* (*p*), where a yard, which appeared in the particulars as comprised in the property sold, was in reality held by the vendor as a yearly tenant.

What is subject to Compensation.—Moreover, the purchaser is entitled to be relieved from his contract if there is a material deficiency in the dimensions of the property.

- (*k*) *Cato v. Thompson*, 9 Q. B. D. Ch. 815.
616.
(*l*) Cf. *Chiffriel v. Watson*, 40 C. D. 45.
(*m*) *Rudd v. Lascelles*, (1900) 1 (n) 3 Camp. 285.
(*o*) 14 C. D. 270.
(*p*) 3 A. & E. 355.

On the other hand, it must be remembered that every variance from the description in the particulars will not enable the purchaser to resist specific performance. In one case (*q*), a misdescription as to quantity, amounting to 339 square yards, was held to fall within the condition as to compensation. Cotton, L. J., in his judgment (*r*), said : "I do not say that such a difference of quantity as exists here would not in any case alter the substance of what a purchaser intended to buy, but here what he intended to buy was a well-defined and fenced-off property." The decision must depend upon the circumstances of each case (*s*).

In a recent case (*t*) it was held that the existence of a public sewer under the property, which was not known to the vendor at the time of the sale, fell within the condition as to compensation, and that the purchaser was bound by the contract. But the circumstances of this case were very special, and it is submitted that, as a general rule, the existence of such a *sewer* would be considered a fatal defect, although the existence of a *drain* from an adjoining house would clearly come within the condition.

The fact that the land sold is subject to dower has always been considered a subject for compensation, and does not entitle the purchaser to repudiate (*u*).

Condition excluding Right to Compensation.—In some cases the condition stipulates not only that a misdescrip-

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| <i>(q) In re Contract between Fawcett and Holmes</i> , 42 C. D. 150.
<i>(r) At p. 158.</i>
<i>(s) Cf. Dyer v. Hargreave</i> , 10 Ves. 505; <i>Jacob v. Ravell</i> . Buckley, J. | <i>Aug. 8th, 1900.</i>
<i>(t) Brewer v. Hankin</i> , 80 L. T. 127.
<i>(u) Brewer v. Broadwood</i> , 22 C. D. at p. 107. |
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tion shall not annul the sale, but that *no* compensation shall be allowed in respect thereof.

In such a case the Court will not, where the misdescription is a substantial one, enforce specific performance against the purchaser, with or without compensation (*v*).

On the other hand, the purchaser is precluded from insisting on specific performance, with compensation for the misdescription (*w*). If the purchaser wishes to enforce the contract, he must do so at the price originally stipulated (*x*), and cannot obtain specific performance at a reduced price.

Under a general compensation clause, it is presumed that the vendor may claim to have the purchase money increased by way of compensation when the land sold is in excess of the dimensions stated in the particulars (*y*).

SECTION 7.

Restrictive Stipulations generally.

We now come to consider the stipulations frequently inserted in contracts for sale and purchase of real estate restrictive of the purchaser's right to such a deduction of title as in the absence of such stipulations he would be entitled to call for; and with reference to stipulations of

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| <p>(<i>v</i>) <i>Whittemore v. Whittemore</i>, 8 Eq. 608.</p> <p>(<i>w</i>) <i>Terry and White's Contract</i>, 82 C. D. 14.</p> <p>(<i>x</i>) <i>Cordingley v. Cheesborough</i>,</p> | <p>3 Giff. 496.</p> <p>(<i>y</i>) Cf. <i>Leslie v. Thompson</i>, 9 Hare, 268; <i>Re Orange and Wright</i>, 52 L. T., N. S. 606.</p> |
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this character, and, in fact, to all stipulations having a restrictive tendency, it is to be remarked that such stipulations must be expressed in terms the most clear and unambiguous (*a*); and if there be any misapprehension as to their meaning, they will be construed in favour of the person whose rights are restricted (*a*).

Persons acting in a fiduciary character, as we have seen, are usually authorised, by the document under which they derive their powers, to sell, subject to such special or other stipulations, either as to title or evidence of title as they may think fit, and such an authority is implied by statute in the case of instruments coming into operation after the 31st December, 1881 (*b*). The words "may think fit" must, of course, be construed as meaning, may honestly think fit in a proper exercise of their discretion (*c*).

Thus, trustees are not justified in using special conditions, which depreciate the property, where there is no necessity for them (*d*); but no conveyance can be upset on this ground unless there has been collusion between the purchaser and the trustees (*e*).

Before conveyance, a sale by trustees may be impeached if it appears that the consideration has been rendered inadequate by the depreciatory nature of the conditions (*f*).

(*a*) *Symons v. James*, 1 Y. & C. C. C. 487.

(*a*) *Osborne v. Harvey*, 7 Jur. 229; *Seaton v. Mapp*, 2 Coll. 556; *Drysdale v. Mace*, 5 De G., M. & G. 108; *Webb v. Kirby*, 7 De G., M. & G. 376; *Smith v. Watis*, 4 Drew. 338.

(*b*) Trustee Act, 1893, s. 18.

(*c*) Cf. *Smith v. Thompson*, (1896) 1 Ch. 71.

(*d*) *Dance v. Goldingham*, 8 Ch. 902; *Dunn v. Flood*, 28 C. D. 586.

(*e*) Trustee Act, 1893, s. 14, sub-s. 2.

(*f*) *Ib.* sub-s. 1.

SECTION 8.

Commencement of Title.

One of the most common conditions restrictive of the rights of a purchaser with reference to title is as to the commencement thereof.

The Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. 3, provides—

“A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed.”

Investigations of Prior Title.—A condition that the abstract shall commence with a specific document will not preclude the purchaser from investigating the earlier title *aliunde*, if he has the means of doing so (*g*) ; but the fact that recited instruments appear from such recitals to be of a suspicious character will not, it is conceived, entitle him to make requisitions as to them (*h*).

(*g*) *Sellick v. Trevor*, 11 M. & W. 722; *Darlington v. Hamilton*, Kay, 550.

(*h*) *In re Scott and Alvarez's Contract*, (1895) 1 Ch. 596.

Moreover, the condition may be framed in such a way as to preclude inquiry and investigation for every purpose (*i*). Such a condition is construed strictly, and must be expressed in clear and unambiguous language (*j*).

The following condition seems to answer this purpose, viz.:—"The title shall commence with an indenture of, &c., and the prior title, *whether appearing in any abstracted document or not*, shall not be required, investigated, or objected to."

If, however, the vendor discloses some blot on the prior title which was not discovered through any inquiry made by the purchaser, the purchaser is not precluded by the condition from raising the objection (*k*).

When Conditions misleading.—It sometimes happens that a title cannot be proved in every step, and a condition should in that case be inserted, precluding the purchaser from making any objection or requisition as to the *intermediate* title to the premises between the root of title and some subsequent instrument. A purchaser is bound by the conditions restricting his right of inquiry, unless he can show that they are *misleading*. A condition is misleading if it contains a statement by the vendor which he knows to be untrue (*l*); or if the vendor, knowing he has a *bad* (as opposed to a *doubtful*) title, tries to palm it off upon the purchaser (*m*).

(*i*) *Hume v. Bentley*, 5 De G. & Sm. 520; *In re National Provincial Bank of England and Marsh*, (1895) 1 Ch. 190.

(*j*) *Waddell v. Wolfe*, L. R., 9 Q. B. 515.

(*k*) *Warren v. Richardson*, You. 1; *Smith v. Robinson*, 18 C. D. 148.

(*l*) *In re Banister*, 12 C. D. 181.

(*m*) *Scott and Alvarez's Contract*, (1895) 1 Ch. at p. 605.

But where a vendor cannot explain a particular transaction, he may stipulate that the purchaser shall not inquire into it; and where he believes a statement to be true, but is not in a position to establish it by legal proof, he may, by an express condition, preclude the purchaser from insisting on such proof (*n*). If this were not so, it would be impossible to protect a vendor against a difficult and doubtful title, and many properties would become absolutely unsaleable.

Such Title as the Vendor has.—A vendor may stipulate for the production only of such title, or evidence of title, as he may have; and a purchaser, under such a stipulation, will be bound, although the title may be defective (*o*); but this condition does not relieve the vendor from the obligation to make out the best title he can from the materials he possesses, or from paying off a mortgage on the property (*p*). A stipulation that a purchaser shall be entitled to the production only of such of the documents of title as are in the vendor's possession, will not preclude the purchaser from requiring a good title to be deduced and otherwise satisfactorily verified (*q*); and where the contract states as a fact that the vendor has power to sell the fee, the purchaser is entitled to require the vendor to show such power (*r*).

(*n*) *In re Sandback and Edmondson's Contract*, (1891) 1 Ch. 99.

(*o*) *Freme v. Wright*, 4 Madd. 364; *Willmott v. Wilkinson*, 6 B. & C. 506; *Duke v. Barnett*, 2 Coll. C. C. 337; *Hume v. Pocock*, 1 Ch. 379. But as to specific performance, see p. 285.

(*p*) *Keyn v. Haydon*, 20 L. T. 244; *Goold v. Birmingham, Dudley, etc. Bank*, 4 T. L. R. 413.

(*q*) *Southby v. Hutt*, 2 My. & Cr. 207.

(*r*) *Johnson v. Smiley*, 17 Beav. 223.

SECTION 9.

Production of Title-Deeds for Inspection.

In the absence of stipulation to the contrary, the vendor must, at the expense of the purchaser, produce for examination with the abstract all documents of title, except instruments on record, whether in his possession or not, and although he may only have a covenant or acknowledgment for their production. It is the duty of the purchaser to require that all title-deeds be produced for his inspection, and an omission to require production has been held to be such gross negligence as to postpone the purchaser of the legal estate to a prior equitable mortgagee (*s.*)

If a deed has been lost or destroyed, it is incumbent on the vendor to furnish sufficient evidence of loss, and also to prove the execution and delivery of the lost document. In this case, therefore, it is desirable to provide by an express condition that no objection or requisition shall be made in respect of the loss and non-production of the deed.

The Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. 6, provides—

“On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of Courts, Court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor’s possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making,

(*s.*) *Oliver v. Hinton*, (1899) 2 Ch. 264.

verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same ; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

Notwithstanding this sub-section, it is still the duty of the vendor, as we have seen, to furnish a proper and complete abstract of title at his own expense (*t*). But when it comes to verifying the abstract by the production of deeds not in the vendor's possession, the whole expense is thrown on the purchaser by this section, unless a contrary intention is expressed in the contract of sale (*u*). It seems that a vendor who has not any of his title-deeds in his possession may enter into a contract of sale without disclosing that fact or making any condition, throwing the expense upon the purchaser of ascertaining where they are. Thus, where the purchaser makes a requisition as to the production of the title-deeds, the vendor may safely answer, "I do not know where they are; and if you want to know, I will find out at your expense" (*v*).

- (*t*) *Johnston to Tustin*, 30 C. D. N., 1889, 66.
42.
(*u*) C. A., 1881, s. 3, sub-s. 9,
and cf. *Re Willett and Argenti*, W.
(*v*) *Stuart and Olivant and Seardon's Contract*, (1896) 2 Ch. 328.

SECTION 10.

Custody of Title-Deeds.

The Custody of the title-deeds after completion is frequently the subject of special conditions.

Right of Purchaser to Custody.—In the absence of express stipulation, the purchaser is entitled to all deeds and documents, *however ancient*, which are in the possession or power of the vendor, unless the vendor retains part of the estate to which such muniments relate (*w*). The vendor must bear the expense of obtaining title-deeds required by the purchaser to be handed over on completion, although such title-deeds are not in the vendor's possession, and are not referred to in the abstract. The mere fact that obtaining the deeds for the purpose of handing them over on completion may cause the vendor expense, is no answer to the purchaser (*x*).

The right to the deeds goes with the land; and the owner of land is entitled to the custody of the title-deeds relating to it, and can maintain an action for them even though the conveyance to him contains no express grant of the deeds (*y*). Where, however, title-deeds relate to two or more portions of an estate which is held by tenants in common, if any one of the interested parties gets possession of the deeds, none of the other parties can get them from him, for no one can show a better title than the one he has (*z*).

A vendor, having entered into a covenant for production.

(*w*) See Dart, V. & P. 762.

Newcastle, (1897) 2 Ch. 148.

(*x*) *Re Duthy and Jesson*, (1898) 1 Ch. 419.

(*z*) *Wright v. Rowbotham*, 33 C. D. 108.

(*y*) *Re Williams and Duchess of*

of deeds to a former purchaser, is not justified in refusing to deliver the deeds to the second purchaser if he will allow notice of the covenant to be placed upon his conveyance, and will covenant to perform the prior covenant or acknowledgment, or acknowledge the right of the first purchaser to production in case the vendor's first covenant or acknowledgment was made determinable upon his procuring a substituted covenant (*a*) ; if, therefore, in the face of this, the vendor is desirous of retaining the deeds, the contract should stipulate accordingly.

If the contract does not provide for the custody of the deeds on a sale in lots, the purchaser whose purchase-money is largest in amount will be entitled to them.

If the contract provides that the title-deeds are to be delivered to the purchaser of the largest lot, the purchaser of the largest lot in value and extent would be entitled to them in preference to a purchaser of several lots in value and extent exceeding that of the largest lot (*b*) ; and a provision making the purchaser of the largest lot entitled to the deeds, will entitle the purchaser of the largest lot in superficial area to them (*c*).

Retainer of Deeds by the Vendor.

By the fifth Rule of sect. 2 of the Vendor and Purchaser Act, 1874, it is provided that, "Where the Vendor retains any part of an *estate* to which any documents of title relate, he shall be entitled to retain such documents." "Estate" in this rule means an *estate in land*, that is land with the enlarged meaning given to the word by sect. 3 of the Interpretation Act, 1889, viz., a freehold, copyhold, or

(*a*) *Sugd. V. & P.* 435.

(*c*) *Griffiths v. Hatchard*, 1 K. &

(*b*) *Scott v. Jackman*, 21 Beau. J. 17.
s. 110.

leasehold estate in land. Thus, on a sale by a mortgagee, under a mortgage deed which comprises land and also policies of insurance upon the life of the mortgagor, the purchaser of the land is entitled to the custody of the mortgage deed although the vendor retains the policies (*d*).

Attested Copies.—Where the vendor retains the title-deeds, the purchaser is entitled to have attested copies furnished to him by the vendor (*e*), but the Conveyancing Act, as we have seen (*f*), throws the expense thereof on the purchaser.

Covenants for Production.—The purchaser is also entitled to a covenant from the vendor or of statutory acknowledgment from the vendor of the right of the purchaser to production of title-deeds which are not handed over on completion. The purchaser is not, however, entitled to a covenant or acknowledgment for production of deeds which were merely produced for the purpose of showing that they did not contain anything affecting the title (*g*), and when he is buying a *part* only of the vendor's property he cannot require a covenant or acknowledgment as to deeds not included in the abstract of title (*h*).

The vendor's liability to give a covenant for production is now, as a general rule, satisfied by an acknowledgment of right to production under the Conveyancing Act (*i*). It must, however, be borne in mind that a statutory acknowledgment is of no effect except as to documents *in the possession* of the person giving the same. Thus, if the deeds are in the custody of a third party (*e.g.* a mortgagee)

(*d*) *Re Williams and Newcastle*, (1897) 2 Ch. 144.

(*g*) Sugd. V. & P. 14th ed., p. 452.

(*e*) *Dare v. Tucker*, 6 Ves. 460.

(*h*) *Re Guest and Worth*, Stirling,

(*f*) *Supra*, p. 230.

J., in chambers, 20th May, 1889.

(*i*) See *infra*, p. 236.

who refuses to give an acknowledgment, the vendor must enter into a covenant for production (*j*).

Costs of Covenants and Acknowledgments.—Rule 4 of sect. 2 of the Vendor and Purchaser Act provides that “such covenants for production as the purchaser can and shall require, shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.” Although, therefore, the expense of preparing and engrossing covenants for production, and the stamp, falls on the purchaser, the expense of procuring their execution falls on the vendor (*k*).

Limit of Covenantor's Liability.—The covenant formerly provided for determining the covenant on delivery of the deeds to a future purchaser, on such purchaser entering into a covenant for their production; and where the vendor was not beneficially interested in the estate, it was usual for the contract to restrict the operation of the covenant, so far as it was personal, to such period as the deeds remained in the actual custody of the covenantor or his representative, but to extend it to the deeds themselves into whosoever custody the same may now be delivered. These provisions are now unnecessary in the case of acknowledgments, as the Conveyancing and Law of Property Act, 1881, sect. 9, sub-sect. 9, confines the liability for the production of deeds under the acknowledgment there provided for, to each individual possessor or person so long only as he has possession or control of the documents, the right to the production of which is acknowledged.

(*j*) *Re Purcell and Deakin*, W. N. (*k*) Coventry Con. Ev. 133.
189^o 152

Equitable Right to Production.—Should the purchase be completed without an acknowledgment being given for production, the purchaser is nevertheless entitled in equity to have the deeds produced to him (*l*), and the inability of the vendor to furnish the purchaser with a legal covenant or acknowledgment for production and furnishing copies of documents of title is not an objection to title in case the purchaser will, on completion of the contract, have an equitable right to the production of such documents (*ll*).

Undertaking for Safe Custody.—An ordinary vendor is bound (in the absence of stipulation to the contrary) to give an undertaking for safe custody (*m*) of documents retained by him, and it is presumed that the benefit of the statutory undertaking devolves in the same manner as an acknowledgment. In the case of trustees and mortgagees the contract should stipulate that no undertaking will be given (*mm*).

Provisions of the Conveyancing Act.—The following are the provisions contained in sect. 9 of the Conveyancing and Law of Property Act, 1881, relating to the production and safe custody of title-deeds.

"9.—(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(*l*) *Fain v. Ayers*, 2 Sim. & Stu. 533.

(*ll*) See V. & P. Act, 1874, s. 2, rule 3.

(*m*) See *infra*, pp. 238-9.

(*mm*) See *Key & Elphinstone's Precedents*, Vol. I., p. 421. Whether a trustee or mortgagee can in any case be made to give an undertaking seems doubtful, see 29 Sol. J. 215.

“(2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

“(3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

“(4) The obligations imposed under this section by an acknowledgment are—

“(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection and of comparison with abstracts or copies thereof, by the person entitled to request production, or by any one by him authorised in writing; and

“(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any Court, or in the execution of any commission, or elsewhere in the United Kingdom,

on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

- “(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

“(5) All costs and expenses, of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment, shall be paid by the person requesting performance.

“(6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

“(7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents, or any of them, to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

“(8) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

“(9) Where a person retains possession of documents

and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncancelled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

“(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

“(11) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.

“(12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

“(13) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

"(14) This section applies only to an acknowledgment or undertaking given or a liability respecting documents incurred after the commencement of this Act."

SECTION 11.

Identity.

It is frequently necessary to provide by the contract that the purchaser shall admit the identity of the parcels of the estate sold, upon the evidence afforded by comparison of the description in the contract and the muniments, and that further evidence of identity shall not be called for, in the absence of which a purchaser is entitled to be furnished with satisfactory evidence of identity of the parcels; but such a provision, unless framed to meet the particular discrepancy, will not relieve the vendor from pointing out the entire property proposed to be sold (*n*), or preclude a purchaser from requiring evidence of identity if the descriptions of the parcels in the contract vary from those in the abstracted documents (*o*). And where it was provided that the purchaser should not require any further proof of identity than was furnished by the title-deeds, it was held that a good title was not made under the contract, inasmuch as the contract was, in effect, that the deeds should show identity, and no identity was in fact shown (*p*).

So far as regards copyholds, if it can be shown that the property has been held under the descriptions thereof on

- (*n*) *Robinson v. Musgrave*, 2 Moo. & R. 92. 476.
(*o*) *Flower v. Hartopp*, 6 Beav. (*p*) *Curling v. Austin*, 2 Dr. & Sm. 129.

the Court rolls, mere vagueness in such description will be unimportant (*q*).

Mixed Freeholds and Copyholds.—Upon a sale of lands of different tenures, or copyholds held of different manors, it is usual to stipulate that the vendor shall not be required to distinguish the particular lands held under each tenure or manor, and in the absence of such a stipulation the lands of each tenure or manor would have to be identified (*r*).

SECTION 12.

Recitals—Easements—Non-Registration.

Recitals.—It was formerly usual to provide, that all recitals and statements of matters of fact or conclusions of law contained in any abstracted deed or document dated twenty years prior to the day of sale, should be accepted as conclusive evidence of the truth and correctness of such matters and conclusions. In the absence of this stipulation, a mere provision that recitals should be evidence would not bind the purchaser to accept recitals as evidence of conclusions of law (*s*).

The Vendor and Purchaser Act, 1874, provides that recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall

(*q*) *Long v. Collier*, 4 Russell, 267; *Cross v. Lawrence*, 9 Hare, 462, and cf. *Searle v. Cooke*, 43 C. D.

(*r*) *Monro v. Taylor*, 8 Hare, 66; *Dawson v. Brinckman*, 3 Mac G. 519.

(*s*) Jarn. Conv. by S. 4.

be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*t*). It has been held under this rule, that a recital in a conveyance more than twenty years old that the vendor was seised in fee is sufficient evidence of that fact, and no prior abstract of title can be required, nor need a forty years' title be furnished (*u*).

The Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. 3, provides that a purchaser shall assume, unless the contrary appears, that the recitals contained in any abstracted instruments of any deed, will, or other document prior to the root of title are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, enrolment, or otherwise.

Easements.—A statement that the property is sold subject to all rights of way and water and other easements (if any) existing over or upon the same, is frequently inserted in the contract; and in such case the vendor is entitled to have these restrictive words inserted in the habendum of the conveyance or assignment (*v*). It is presumed, however, that a general condition of this kind does not relieve the vendor from the duty to disclose the existence of an easement if he is aware of its existence (*w*). If the property is stated in the contract to be free from

(*t*) 37 & 38 Vict. c. 78, s. 2, r. 2.

(*u*) *Bolton v. London School Board*, 7 Ch. D. 766; and cf. *In re Marsh and Granville*, 24 C. D. 11, *sed*

quære. Is not this the recital of a proposition of law, not of fact?

(*v*) *Gale v. Squier*, 5 Ch. D. 625.

(*w*) See Dart, V. & P. 177.

land tax or tithe, and the vendor has no proof in support of such statement in his possession, it is usual to provide that no inquiry shall be made on the point, as in the absence of such a stipulation the vendor would be bound to produce evidence in support of his statement, and upon a sale of enfranchised copyholds the minerals and other rights reserved to the lord by the Copyhold Acts should be excepted from the sale (*x*).

Registration.—If the estate is situate in a register county, it is usual to provide that no objection shall be taken on account of the non-registration of any document of title (if any) not registered, and to stipulate that the expense of registering such document, if the purchaser require it registered, shall be borne by him.

Stamping.—In the absence of express stipulation, the expense of stamping all documents of title including a lease or tenancy agreement, subject to which the property is sold, falls on the vendor (*y*). It is, therefore, usual to insert a condition that the expense of stamping unstamped or insufficiently stamped documents shall be borne by the purchaser. It is assumed, however, it should not be provided that a document unstamped or insufficiently stamped shall not be stamped, as such a provision might be held to be a contract prejudicial to the revenue, and as such not enforceable (*z*). It is now, moreover, enacted by sect. 117 of the Stamp Act, 1891,

(*x*) *Upperton v. Nicholson*, L. R., 6 Ch. 436. W. 452; *Nixon v. Albion Marine Insurance Co.*, L. R., 2 Ex. 338.

(*y*) *Coleman v. Coleman*, 79 L. T. 66. See also *Whiting and Loomes*, L. R., 14 Ch. D. 822.

(*z*) *Smith v. Mawhood*, 14 M. &

that every condition of sale framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument *executed after the 16th of May, 1888*, and every contract, arrangement or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument, or indemnifying against such liability, absence, or insufficiency, shall be void.

SECTION 13.

Costs of Conveyance and of getting in Outstanding Estates.

Conveyance.—In the absence of express stipulation, the purchaser prepares and pays for the preparation of the conveyance, but the costs of *perusal* and *execution* by all necessary conveying parties fall on the vendor (*a*).

Outstanding Estates.—The contract frequently provides that every assurance and act which may be required by the purchaser for getting in, surrendering or releasing any outstanding estate, or for completing the vendor's title, shall be prepared at the expense of the purchaser.

In the absence of such a stipulation, outstanding estates and incumbrances must be got in at the vendor's expense, by deeds distinct from the conveyance, or the purchaser may require the vendor to bear the increased expense of the purchase deed by reason of the concurrence of trustees and incumbrancers therein (*b*).

(*a*) *Dart, V. & P.* 798.

(*b*) *Reeves v. Gill*, 1 Beav. 375.

But such expense would not be thrown upon the vendor if the incumbrances be kept on foot for the purchaser's protection (*c*).

In a case where, after contract signed, the vendor died, having devised the legal estate to an infant, it was held that his estate must bear the expense of a suit thus rendered necessary, but it was otherwise if he died intestate, leaving an infant heir (*d*). It is presumed that this rule still applies in the case of copyholds.

When the conditions of sale stipulate that the *conveyance* is to be made at the expense of the purchaser, although the purchaser must pay the costs of a conveyance or surrender by the vendor, he is not bound to bear the expense of procuring the concurrence of other proper parties (*e*). Again, where by the conditions a proper assurance and "every other *instrument* required for getting in or releasing any outstanding estate, right, or interest, etc.," is to be *prepared* by and at the expense of the purchaser, the expense of procuring the concurrence of mortgagees still falls on the vendor (*f*). On the other hand, if the condition stipulates that the assurance and "every other *act and thing* required by the purchaser for perfecting or completing the vendor's title, or otherwise shall be prepared, obtained, *made* and *done* by and at the expense of the purchaser," the contract throws the expense of procuring the concurrence of mortgagees on the purchaser (*g*).

- (*c*) *Cooper v. Cartwright*, Johns. Sm. & G. at p. 544.
679. (*f*) *Re Sander and Walford*,
(*d*) *Purser v. Darby*, 4 Kay & J. (1900) W. N. 188.
41; *Barker v. Venables*, 11 Jur. 480. (*g*) *Re Willett and Argenti*,
(*e*) *Paremore v. Greenslade*, 1 (1889) W. N. 66.

SECTION 14.

Apportionment as between the Land Sold and Other Land.

Rent.—When property subject to a lease at an entire rent is sold in lots, or a portion thereof only is sold, provision should be made by the contract for the apportionment of the rent, and if the tenant's concurrence in the apportionment cannot be obtained (without which no legal apportionment can be made (*h*)), the purchaser should be precluded from taking any objection on that account.

So, too, in the converse case of a lessee selling a property in lots which is held under one demise, unless the lessor is willing to concur, some provision for apportionment must be made in the conditions (*i*). A provision that the assignee shall pay the apportioned rent and keep the assignor indemnified against it will not increase the *ad valorem* stamp duty on the conveyance (*j*).

It is usual to provide that the purchaser of the largest lot shall take an assignment of the lease, either upon an undertaking to grant sub-terms (less one day) to the other purchasers, or subject to sub-terms previously granted to the other purchasers by the vendor. Such underleases to contain all necessary covenants for indemnifying the grantees of the underleases against loss or damage for non-performance of covenants or non-payment of rent in respect of any lots other than those sold (*k*).

(*h*) *Bliss v. Collings*, 5 B. & A. 876, but cf. *Wolstenholme*, p. 51.

(*i*) As to apportionment of leaseholds under the Lands Clauses Act, see 8 & 9 Vict. c. 18, s. 119.

(*j*) *Strayne v. Commissioners of Inland Revenue*, (1900) 1 Q. B. 172.

(*k*) *Browne v. Paull*, 26 L. T. O. S. 232.

Tithe Rent-Charge.—Where the owner of property subject to *one entire* tithe rent-charge is selling the property in lots, it is desirable to insert a condition protecting the vendor from the trouble and expense of an apportionment under sect. 72 of the Tithe Act, 1836 (*l*). But where lands charged with one entire rent-charge have become vested in several owners, and one of those owners sells his property, he cannot be required to apportion the rent-charge (under sect. 14 of the Tithe Act, 1842 (*m*)), between his property and the other lands subject to it (*n*).

Rent-Charges.—Formerly the release of *part* of land subject to an annuity or other rent-charge released the whole of the land charged. This inconvenience was got rid of by sect. 10 of Lord St Leonards' Act (*o*), which enacts that the release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released. If, however, the terre-tenant of the unreleased portion does not concur in the release, he is only liable to a *proportionate* part of the rent-charge in respect of such unreleased land (*p*).

Where the owner of the rent-charge has not concurred in an apportionment, an owner of a portion of the land, subject to a rent-charge, can be sued for the whole amount thereof,

(*l*) 6 & 7 Will. IV., c. 71. An apportionment may be made either by the tithe commissioners or by the commissioners of land tax with the consent of two justices of the peace.

(*m*) 5 & 6 Vict. c. 54.

(*n*) *In re Ebsworth and Tidy's Contract*, 42 C. D. at p. 50.

(*o*) 22 & 23 Vict. c. 35, s. 10.

(*p*) *Booth v. Smith*, 14 Q. B. D.

but has a right of action over against the owners of the other portions (*q*). If, therefore, the owner of the rent-charge is unwilling to release the land sold, some special stipulation as to apportionment should be made. An improvement rent-charge created under the Improvement of Land Act, 1864, may be apportioned by the Board of Agriculture under sects. 68-71 of that statute. As between the owners of the rent-charge, an apportionment may be made without the consent of the terre-tenant so as to keep alive the right of each owner to distrain for his part (*r*).

SECTION 15.

Apportionment as between Vendor and Purchaser.

Rent.—As already stated, where there is a time fixed for completion, the vendor is entitled to the rents up to that time (*s*).

The Apportionment Act, 1870 (*t*), provides that after the 1st August, 1870, all rents and other periodical payments in the return of income shall be considered as accruing from day to day, and there seems no reason why this should not include the case of apportionment of rent between vendor and purchaser (*u*), but it is usual

(*q*) *Christie v. Barham*, 53 L. J., Q. B. 537. But a rent-charge is apportionable if it is reserved on a grant of land, and the grantee of the land is evicted from a portion of the land by title paramount; see *Hartley v. Maddocks*, (1899) 2 Ch. 199.

(*r*) *Itivis v. Watson*, 5 M. & W. 255; as to apportionment of rent-charges under the Copyhold Act, 1894, see 57 & 58 Vict. c. 46, s. 28.

(*s*) Fry on Specific Performance, p. 621.

(*t*) 33 & 34 Vict. c. 35.

(*u*) Dart, V. & P. 915.

and desirable to insert an express stipulation as to apportionment.

Outgoings.—The liability to outgoings is coterminous with the right to receive the rents (*v*), and therefore, where a time for completion is fixed, it is presumed (*w*) that the vendor is liable to outgoings up to that date only. Where no time for completion is fixed, then, in the absence of express stipulation, the expenses and outgoings must be borne by the vendor up to the time when the purchaser could prudently have taken possession of the premises sold, *i.e.*, when a good title was first shown (*x*).

Provision for Apportionment.—It is usual, however, to expressly provide in the conditions that, upon completion, all rents, profits, rates, taxes, and outgoings shall be apportioned, if necessary, as from the date fixed for completion. Some taxes, such as property tax, and some rates, such as poor rates, are apportionable, and, accordingly, would be apportioned under this clause.

With regard to expenses *incurred before completion* under the Public Health, Metropolis Management, or London Building Act, if such liabilities are a charge upon the *property*, the vendor is liable, even on an open contract (*y*), provided that the charge accrues before the date fixed for completion (*z*).

On the other hand, if such expenses are a charge upon the *owner*, and not upon the *property*, the vendor is not

(*v*) Fry on Specific Performance, p. 631.

(*w*) But see dictum of Cozens-Hardy, J., in *Barsht v. Tagg*, (1900) 1 Ch. 284-5.

(*x*) *Carrodus v. Sharp*, 20 Beav.

56.

(*y*) *In re Bettlesworth and Richer*, 37 C. D. 585; *Stock v. Meakin*, (1900) 1 Ch. 683.

(*z*) *Re Waterhouse*, 44 Sol. J. 645.

liable on an open contract (*a*) ; but he is liable if he has contracted to discharge all "outgoings" up to the time of completion (*b*). If the contract gives the vendor an option to receive the rents and profits after the date fixed for completion in lieu of interest, this does not impose on him any obligation to discharge outgoings which become payable between the time fixed for completion and the actual completion of the purchase (*c*).

SECTION 16.

Covenants, Allotments, &c.

In sales by fiduciary vendors and mortgagees, it is not unusual to insert a special condition that the vendors will covenant only that they have not incumbered ; although the absence of such a condition would not, it is assumed, render such vendors liable to enter into any other covenants (*d*).

It seems doubtful whether an ordinary vendor may not stipulate by the conditions that he shall not enter into covenants for title (*e*).

When the property sold consists of an allotment under an inclosure award, or an allotment taken in exchange (*f*) it is usual to stipulate that the purchaser shall not be

(*a*) *Egg v. Blayney*, 21 Q. B. D.

107.

(*b*) *Midgley v. Coppock*, 4 Ex. D. 309 ; *Tubbs v. Wynne*, (1897) 1 Q. B. 74.

(*c*) *Barsh v. Tagg*, (1900) 1 Ch. 231.

(*d*) Cf. C. A., 1881, s. 7, sub-s.

1 (f).

(*e*) *Re Scott and Alvarez*, (1895) 1 Ch. at p. 606.

(*f*) See General Inclosure Act, 1845 (8 & 9 Vict. c. 118), ss. 92 and 93. The same rule would apply where land is taken by an *order of exchange* under s. 147.

entitled to call for the production of the title to the property in respect of which the allotment was made.

In the case of enfranchised copyholds it was usual to provide that the purchaser should not call for production of the manorial title unless the enfranchisement had been effected under the Copyhold Acts, but now the Conveyancing and Law of Property Act, 1881, sect. 3, sub-sect. 2, provides that where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not call for the title to make the enfranchisement,

SECTION 17.

Leaseholds.

The Lessor's Title.—Formerly, on a sale of leaseholds, if it was desired to negative the purchaser's right to call for the lessor's title, a special stipulation to this effect was inserted in the conditions.

Now, however, as we have seen, the Vendor and Purchaser Act, 1874 (*g*), provides that, under a contract to assign a term of years, the purchaser is not entitled to call for the title to the *freehold*. This is extended by the Conveyancing Act, 1881 (*h*), which enacts that, under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not

(*g*) 37 & 38 Vict. c. 38, s. 2, r. 1.

(*h*) 44 & 45 Vict. c. 41, s. 3, sub-s. 1.

have the right to call for the title to the *leasehold* reversion (*i*).

The effect of these statutes is to preclude the purchaser of a lease or underlease from calling for the lessor's title unless he expressly stipulates in the contract that he may do so.

Notwithstanding these enactments, the purchaser of a lease or underlease has constructive notice of, and is bound by, restrictive covenants affecting the freehold, or contained in the superior lease (*j*), and a purchaser of an underlease who intends to spend money on the property would be considered guilty of negligence if he did not stipulate by express condition for the right to inspect the head lease (*k*).

Inquiries Aliunde.—It is, therefore, important that a purchaser should make inquiries *aliunde* as to the lessor's title ; and it is submitted that if, as the result of his investigations, he discovers that the lessor's title is defective, or that the property is subject to restrictive covenants, he will be entitled to rescind the contract and recover his deposit (*l*).

It is possible, however, for the vendor by an express condition to preclude the purchaser from objecting to defects in the lessor's title which he may have discovered *aliunde* (*m*).

(*i*) The restricted meaning put upon the words "leasehold reversion" by the Divisional Court, in *Gosling v. Woolf*, (1893) 1 Q. B. 39, seems to arise from a confusion of s. 3 with s. 13. The case, however, is badly reported, and cannot be relied upon.

(*j*) *Patman v. Harland*, 17 C. D.

353 ; and cf. *Clement v. Welles*, 1 Eq. 200.

(*k*) *Imray v. Oakshott*, (1897) 2 Q. B. 218.

(*l*) *Shepherd v. Keatley*, 1 C. M. & R. 117.

(*m*) As to the effect of this, see *supra*, p. 228, and *infra*, p. 285.

Upon a sale of renewable leaseholds, it may be desirable to negative the right of the purchaser to call for any of the leases prior in date to the subsisting lease (*n*).

Production of Lease.—On a sale by auction of leaseholds it is usual to state upon the particulars and conditions that the lease will be produced at the sale, and that it may be inspected previously, and stipulate that the purchaser shall be deemed to purchase with full notice of its contents and the condition of the premises as regards repairs and all other matters, and in the absence of such a stipulation a purchaser would still be deemed to have notice, provided a reasonable opportunity has been afforded him of examining the lease; but the contract must not contain misrepresentations or omissions (*o*).

Last Receipt for Rent.—The Conveyancing and Law of Property Act, 1881, sect. 3, sub-sects. 4 and 5, provides that, on production of a receipt for the last payment of rent due before completion of the purchase, it shall be assumed, *unless the contrary appears*, that all the covenants and provisions under the lease or underlease sold have been observed and performed up to the date of completion of the purchase.

This provision, however, does not apply to the case of a building lease at a peppercorn rent (*p*); and in such a case an express condition should be made that possession by the vendor up to the time of completion shall be conclusive evidence of the performance of the covenants.

Moreover, if there is any question of waiver of breaches

(*n*) *Hodgkinson v. Cooper*, 9 Beav. 304. 736; *Jones v. Rimmer*, 14 C. D. 588.

(*p*) *Moody and Yates' Contract*,

(*o*) *Weston v. Savage*, 10 C. D. 30 C. D. 344.

of covenant by the lessee, an express condition is desirable, making the last receipt for rent *conclusive* evidence of waiver (*q*); although, even in the absence of express condition, a purchaser may be compelled to presume a waiver on sufficient evidence, *e.g.*, where there has been uninterrupted use of the premises as a public-house for upwards of thirty years, with the knowledge of the lessor, in contravention of a covenant in the lease (*r*).

In the case of an ordinary lease, it sometimes happens that the last receipt for rent cannot be found, and in that case a similar stipulation in the conditions of sale will be necessary (*s*).

On the sale of an underlease, a receipt given to the underlessee by the ground landlord is not sufficient (*t*).

Where the title to the reversion is in dispute, it is desirable to stipulate that the person giving the last receipt for rent shall be deemed to be the person entitled to the rent reserved by the lease; but it must not be supposed that where a purchaser buys a lease, the vendor is bound to deduce the title of the reversioner for the purpose of showing exactly who is the person entitled to receive the rent (*u*).

SECTION 18.

Sales by Auction.

Varying Particulars.—As to sales by auction, it should be remarked that the particulars and conditions cannot be

(*q*) Cf. *Laverie v. Lees*, 14 C. D. 249. (*s*) Cf. *Ringer v. Thompson*, 51 L. J., Ch. 42.

(*r*) *Gibson v. Doeg*, 2 H. & N. 615: *Re Summers*, (1900) 1 Ch. 112. (*t*) *Re Higgins and Percival* 32 Sol. J. 559. (*u*) *Pegler v. White*, 33 Beav. 406.

verbally varied at the time of sale (*v*), even though the purchaser may have agreed in writing to abide by the conditions and declarations made at the sale (*w*); but if it clearly appears that a purchaser heard and understood the effect of the verbal declaration, he would probably not obtain a decree for specific performance without such variations, if they were prejudicial to him (*x*); nor could he, on the other hand, enforce specific performance with the variations, supposing them to be in his favour; but personal information given to a purchaser may be given in evidence by either vendor or purchaser as a defence against a specific performance (*y*). Parol evidence as to knowledge by a purchaser is admissible where he seeks to enforce the contract with compensation. But, if the purchaser repudiate the contract, parol evidence that he was informed of a defect and knew that the written description was misleading, is inadmissible if the description is unambiguous (*z*). The proper course when the vendor discovers a mistake in the particulars is to alter them in writing before the sale, or else to issue a *second edition*; but care should be taken that the alterations are brought to the notice of the purchaser before he signs the contract of sale (*a*).

Bidding at an Auction.—On a sale by auction the condi-

(*v*) *Heywood v. Mallalieu*, 25 C. D. 357; *Higginson v. Cloves*, 15 Ves. 516.

(*w*) *Gunnis v. Erhart*, 1 H. Bla. 289; *Powell v. Edmunds*, 12 East, 6; *Torrance v. Bolton*, L. R., 8 Ch. 118.

(*x*) *Ogilvie v. Foljambe*, 3 Mer. 53; *Woodward v. Miller*, 2 Coll. 279. In *Hare and O'More's Contract*, Nov. 14, 1900, Joyce, J., refused specific

performance with compensation, although the purchaser did not hear the statement of the auctioneer varying the particulars.

(*y*) *Ogilvie v. Foljambe*, 3 Mer. 65; *Cloves v. Higginson*, 1 V. & B. 524.

(*z*) *Cato v. Thompson*, 9 Q. B. D. 616.

(*a*) *Goddard v. Jeffreys*, 51 L. J. Ch. 57; *Morton v. Noye*, 13th July 1900, Bruce, J.

tions usually state that the highest bidder shall be the purchaser (unless the sale is by the direction of the Court), and stipulate that not less than a specified sum shall be advanced at each bidding, and that no bidding shall be retracted.

In the absence of a condition against a bidding being retracted, a bidder may, before the fall of the hammer, retract his bidding (*b*), and it would even seem doubtful whether a purchaser's right in this respect is negatived by such a condition (*c*); but after a lot has been knocked down, neither vendor nor purchaser can revoke the authority conferred by him on the auctioneer (*d*).

At the time of the passing of the Sales of Land by Auction Act, 1867 (*e*), if property were put up for sale without reserve, the sale was vitiated by a person being employed by the vendor to bid; but in the absence of such a statement the employment of a bidder to prevent the property being sold at an undervalue seemed generally allowable in equity (*f*); though Lord Cranworth expressed a doubt whether, in the absence of express stipulation, a vendor might employ a bidder (*g*).

Sales by Auction Act.—The law upon the subject is now defined by the Act just referred to, which enacts that whenever a sale by auction of land would be void at law by reason of employment of a puffer, the same shall be deemed invalid in equity as well as at law (*h*).

(*b*) *Payne v. Cave*, T. R. 148; *Routledge v. Grant*, 4 Bing. 653.

(*c*) *Sugd. V. & P.* 14; see, however, *Freer v. Rimner*, 14 Sim. 891.

(*d*) *Day v. Wells*, 30 Beav. 320.

(*e*) 30 & 31 Vict. c. 48.

(*f*) *Thornett v. Hains*, 15 M. & W. 367; *Meadows v. Tanner*, 5 Madd. 34.

(*g*) *Mortimer v. Bell*, L. R., 1 Ch. 10.

(*h*) 30 & 31 Vict. c. 48, s. 4.

And after reciting that as sales of land by auction were then conducted, many of such sales were illegal and could not be enforced against an unwilling purchaser, and that it was expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both, enacts that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; if it is stated such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person (*i*).

And where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper (*j*). But if the conditions state that the sale is subject to a reserved price, a person must not be employed to bid up to the reserved price, unless the right to do so is stipulated for (*k*).

Where sales by auction took place by direction of the Court previously to the Act to amend the Law of Auctions, a purchaser was not certain of his bargain until the certificate of the chief clerk became binding, as it was the practice, in certain events, before such certificate became binding, to re-open the biddings; but now the Act just referred to, after reciting that it was the long-settled prac-

(*i*) 30 & 31 Vict. c. 48, s. 5.

(*j*) *Ib.* s. 6.

(*k*) *Gilliatt v. Gilliatt*, L. R., 9

Eq. 60.

tice of Courts of Equity, in sales of land by auction under their authority, to open biddings even more than once, and much inconvenience had arisen from such practice, and it was expedient that Courts of Equity should no longer have the power to open biddings after sales by auction under their authority, it was further enacted that the practice of opening biddings on any sale by auction of land under or by virtue of any order of the Court of Chancery, should, from and after the time appointed for the commencement of the Act (1st of August, 1867), be discontinued; and the highest *bona fide* bidder at such sale, provided he should have bid a sum equal to or higher than the reserved price (if any), should be declared and allowed the purchaser, unless the Court or judge should, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the Court or judge before the chief clerk's certificate and the result of the sale should have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms, as to costs or otherwise, as the Court or judge should think fit (*l.*)

SECTION 19.

Sales by Auction in Building Plots.

Where the vendor is about to sell an estate by auction in building plots, very great care is necessary in framing the conditions of sale, since, in this case, they amount to

(*l.*) 30 & 31 Vict. c. 48, s. 7; *Delves v. Delves*, 20 Eq. 77.

an invitation to the public to come in and purchase on the footing that the whole of the property is to be bound by one general law.

Thus, if the conditions prescribe that the purchasers shall bind themselves by certain restrictive covenants, each purchaser may enforce the performance of these covenants both as against the vendor and against all the other purchasers from him (*m*).

It is therefore desirable that the vendor should reserve, by express condition, the power to make future sales discharged from restrictive conditions.

An example of this is to be found in the case of *Sydney v. Clarkson* (*n*).

SECTION 20.

Beneficial Occupation by Purchaser before Completion.

Should the purchaser be let into possession of the property before completion of the purchase, or be in the occupation thereof at the time of the contract being entered into, the position of the vendor and purchaser, as regards payment of rent or compensation for use and occupation, should be defined.

In the absence of express stipulation the purchaser is the tenant at will of the vendor, but cannot be ejected without proper notice (*o*). If a purchaser in possession refuses to complete, or fails to comply with the conditions under which possession was given to him, the vendor can

(*m*) *Mackenzie v. Childers*, 43 C. D. 265; *Tucker v. Vowles*, (1893) 1 Ch. 195; *Birmingham & District Land Co. v. Allday*, (1893) 1 Ch. 342. But cf. the case of a sale by a municipal corporation, *Davis v.*

Corporation of Leicester, (1894) 2 Ch. 208.

(*n*) 35 Beav. 118; see also *Tyn dall v. Castle*, W. N. (1893), p. 40.

(*o*) *Dart, V. & P.* 1085.

compel him to elect either to pay the purchase money, into Court, or give up possession of the premises (*p*). If, however, the purchaser has committed *acts of ownership* tending to alter the nature of the premises, no option is given him, and he can be compelled to pay the purchase-money into Court (*q*) ; but acts done in the common course of cultivation or necessary repairs do not come within this principle (*r*). Again, the purchaser has no option if he has allowed the property to deteriorate by the acts of strangers (*s*).

In the absence of stipulation to the contrary, the beneficial occupation of the property agreed to be sold by the purchaser will not render him liable for use and occupation pending discussion, if the contract is not completed by reason of the title being defective (*t*), though a purchaser in such an event has been held to be entitled to recover compensation for use and occupation from a tenant whom he let into possession (*u*).

A tenancy at will is determined by a contract for sale from the time at which possession is agreed to be given to the purchaser (*v*), but a tenancy from year to year, or for a longer period, will not be determined by a contract with the tenant for sale to him unless such contract be absolute for purchase, whether the vendor has a good title or not (*w*).

(*p*) *Tindal v. Cobham*, 2 My. & K. 385 ; *Clarke v. Wilson*, 15 Ves. 317 ; and cf. *Cook v. Andrews*, (1897) 1 Ch. 266.

(*q*) *Lewis v. James*, 32 C.D. 326 ; *Greenwood v. Turner*, (1891) 2 Ch. 144.

(*r*) Cf. *Cutter v. Simons*, 2 Mer. 103.

(*s*) *Pope v. G. E. Rail. Co.*, L.R. 3 Eq. 171.

(*t*) *Winterbotham v. Ingham*, 7 Q. B. 611.

(*u*) *Doe v. Mills*, 4 Nev. & M. 25.

(*v*) *Sugd. V. & P.* 178.

(*w*) *Doe v. Stanion*, 1 Mee. & Wels. 695 ; *Tarte v. Darby*, 15 Mee. & Wels. 601.

CHAPTER XIII.

REQUISITIONS ON TITLE.

SECTION 1.

Of Requisitions Generally.

THE requisitions to be made by the purchaser must necessarily depend on the nature of the title disclosed by the Abstract of Title. Most of the questions which are likely to arise in perusing the abstract and drafting requisitions have already been considered in dealing with Incidents of Title, Evidence of Title, and Conditions of Sale.

The purchaser should avoid making frivolous or unnecessary requisitions which might prejudice the Court against him (*a*).

The purchaser should also bear in mind that by pressing a requisition on some conveyancing point, which though technically sound is of no practical importance, he may become liable to pay interest to the vendor, or may induce the vendor to rescind the contract altogether.

It was formerly the custom to ask whether the vendor or his solicitor was aware of any incumbrance, fact, or circumstance not disclosed by the abstract; but it has been held by the Court of Appeal that a general requisition of this character need not be answered (*b*).

(*a*) See Dart, V. & P., p. 413.

(*b*) *Re Ford and Hill*, 10 C. D. 865.

Every question should be specific, but it is generally considered that the vendor is bound to answer *all relevant questions* put to him in respect of the property which he has contracted to sell and the title thereto (*c*).

SECTION 2.

Waiver of Requisitions.

By Delay.—We have already considered the effect of delay in sending in requisitions where there is the usual condition as to their delivery. But the right to make requisitions or requisitions when made may be waived not only by delay but also by the conduct of the purchaser.

By Conduct.—In considering waiver by conduct it must be borne in mind that there is a broad distinction between cases in which the contract provides that a good title shall be shown, and also provides that possession may be taken by the purchaser before the title is completed, and cases in which the purchaser takes possession without any express stipulation in the contract.

The taking possession of the property by the purchaser has frequently been held to operate as a waiver of objections to the title (*d*); but if taken in accordance with the intention of the parties, as evidenced by the contract, or with the consent of the vendor, it will not have that effect (*e*).

(c) *Dart, V. & P.*, p. 167.

(e) *Stevens v. Guppy*, 3 Russ.

(d) *Binks v. Lord Rokeby*, 2 Sw. 222; *Fludyer v. Cocker*, 12 Ven. 25; *Haydon v. Bell*, 1 Beav. 337. 171; *Burroughs v. Oakley*, 3 Sw. 159; *Dixon v. Astley*, 1 Mer. 134.

Again, there is a broad distinction between cases in which the requisitions relate to defects which are removable by the vendor (*e.g.*, requisitions as to conveyance) and cases in which the defects are irremovable. If the purchaser takes possession with knowledge of an irremovable defect, this will be construed as a waiver (*f*).

Acceptance of the title, as deduced by the abstract, will not operate as a waiver of the purchaser's right to have the abstract verified (*g*); and if a purchaser express his willingness to accept the title upon a specific objection being removed, and to waive other objections raised by him, such waiver will be conditional only on the removal of the particular objection specified (*h*).

A client will not be bound by his counsel's acceptance of a defective title (*i*).

SECTION 3.

Points to be Remembered in Drafting Requisitions.

It is of course impossible to enumerate all the points which may arise in drafting requisitions. It is proposed, however, as a convenient reminder, to enumerate certain matters about which it is necessary to requisition in almost every case.

Execution.—It should be seen that all the abstracted deeds were properly executed. If executed by attorney, the purchaser should requisition that the power of attorney be abstracted and the original produced. In the case of

(*f*) *Re Gloag and Miller*, 23 C. D. 320.

(*g*) *Southby v. Hutt*, 2 Myl. & C. 217.

(*h*) *Lesturgeon v. Martin*, 3 Myl. & K. 255.

(*i*) *Davercell v. Lord Bolton*, 18 Ves. 505.

appointments and assurances to charitable uses, it should be seen that the deed is duly attested (*j*). In the case of deeds executed by a company, it is usual to require that the Articles of Association be produced in order to show that the formalities prescribed for the use of the common seal have been complied with.

Identity of Parcels.—It should be seen that the parcels are properly identified. This is particularly important in the case of leaseholds, since when a building speculator takes leases of various plots of land on the same day, it is by no means uncommon for the title to the different plots to be confused in subsequent dealings.

Right to Production.—It should be seen that the abstract discloses proper acknowledgments of right to production of all deeds not in the custody of the vendor.

Indorsed Receipts.—In the case of deeds executed before the Conveyancing Act, 1881, it should be seen that there is an indorsed receipt for payment of consideration.

Death Duties.—It should be considered whether any occasion for payment of succession or estate duty is disclosed.

Acknowledgments.—If a married woman appears in the abstract as a conveying party, it must be considered whether an acknowledgment was necessary.

Stamps.—It must be ascertained that all the abstracted documents were properly stamped.

(*j*) As to what deeds require attestation, see Taylor on Evidence, pp. 730 & 1207.

Mortgages.—If there are any subsisting mortgages disclosed, a requisition should be made that the mortgagees either join in the conveyance, or reconvey before completion. If the purchaser is buying subject to the mortgages, it should be ascertained what interest is now due.

Joint Account.—If one of several mortgagees appears to have died, it should be seen that the abstracted mortgage deed contained a joint account clause.

Receipt for Rents.—If the property is leasehold, the purchaser should require the last receipt for payment of rent to be produced (*k*).

Evidence.—Proper evidence should be required of all births, deaths, and marriages, and all other relevant facts appearing in the abstract.

Roads.—If the property fronts, adjoins, or abuts on a street (*l*), the purchaser should inquire whether the street has been made up and taken over by the Local Authority, and whether all sums payable in respect thereof have been duly satisfied.

Means of Access.—The purchaser should inquire into the means of access to the property sold, if the same is not apparent (*m*).

If the vendor has merely a *way of necessity* over the surrounding lands, the purchaser must ascertain when this way of necessity first arose, since the extent of the right

(*k*) See *supra*, p. 253.

(1891) 2 Q. B. 216, and see *supra*

(*l*) As to the meaning of "street"

p. 249.

see *Jowett v. Local Board of Idle*,
(1888) W. N. 87; *Fenwick v. Rural
Sanitary Authority of Croydon*,

(*m*) *Denne v. Light*, 8 De. G. M.

& G. 774; *King v. Stacey*, 8 T. L.
R. 396.

of way is limited by the necessity which created it (*n*). If the way of necessity is over other lands belonging to the vendor, the vendor is entitled to point out which of two or more means of access shall be granted to the purchaser, subject only to this, that it is a convenient way (*o*).

If the property purchased consists of houses in a town, it is desirable to ascertain that there is a right to sufficient light. A right to light may be acquired by prescription (*p*), implied or express grant, or by express reservation.

Enfranchised Copyholds.—The following points should be considered by a purchaser who is buying enfranchised copyholds:—

- A. Was the enfranchisement in consideration of a rent-charge issuing out of the enfranchised land? (q)

B. In the case of a voluntary enfranchisement under the Act for a *gross sum*, the purchaser should see that this sum has been duly discharged. Until the consideration money has been paid, it is a first charge on the land, and the lord can distrain for it (r). In the case of a compulsory enfranchisement, the award is not made until the receipt of the person entitled to receive the compensation has been produced to the board (s).

(n) Corporation of London v. Riggs, 18 C. D. 798. (q) 57 & 58 Vict. c. 46, ss. 8, 15 (b), and 17.

(o) *Bolton v. Bolton*, 11 C. D. (r) *Ib.* & 19.
988 (c) *Ib.* & 19, sub. n. 4.

(s) *Ib.* s. 10, sub-s. 4.

(p) *Supra*, p. 160.

C. Are the minerals and mining rights still vested in the lord of the manor? The lord's rights in this respect are not affected by an enfranchisement under the Copyhold Act without his express consent in writing (*t*).

Tenancies.—The purchaser should enquire what tenancies now affect the premises. If the terms are in writing, an abstract must be furnished and the counterpart of the lease or agreement handed over on completion. If the terms of any tenancy are not in writing, particulars must be furnished.

Land-Tax and Tithe.—The purchaser should inquire whether there is any land-tax or tithe rent-charge affecting the premises, and if so what is the amount and whether there has been any apportionment.

Easements.—It should be asked whether there are any rights of way or other easements affecting the premises. It is submitted that it is the duty of the vendor to answer this question even where the property is sold subject to all easements.

Party Walls.—Inquiry is usually made whether any of the walls or fences are *party* walls or fences.

Notices.—It is important to ascertain whether any notices have been served on the vendor by any sanitary or local authority, and whether such notices have been duly complied with (*tt*).

(*t*) 57 & 58 Vict. c. 46, s. 23; Enfranchisement Act, 1852, s. 48, cf. *Bellamy v. Debenham*, (1891) 1 Ch. 412; *Upperton v. Nicholson*, 6. Ch. 431.

(*tt*) See *Re Leyland and Taylor's*

Contract, (1900) 2 Ch. 632, where it is suggested that the omission by the vendor to disclose the fact that notices had been served on him might be grounds for refusing specific performance.

Insurance.—A requisition is generally made as to whether the premises have been insured, and, if so, in what office and to what amount; and whether the vendor will hold the policy upon trust for the purchaser, and assign the same upon completion on the usual terms.

Registration of Deeds.—If the property is in Middlesex or Yorkshire, the question whether all the abstracted deeds have been duly registered has to be considered, and it should be seen that certificates of registration are indorsed on the deeds.

Registration of Title.—If the property is within the County of London, and the abstract discloses any conveyance on sale since 1st November, 1898, it must be considered whether registration of title was necessary (*u*).

Custody of Deeds.—Lastly, it should be asked which of the abstracted documents will be handed over on completion.

Should the title-deeds, or any of them, not be produced for examination with the abstract, it is most important that the purchaser should make enquiries as to the cause of their non-production; and the purchaser should not be satisfied unless a reasonable excuse for such non-production should be given, as omission to make inquiry on the subject may be attributed to wilful blindness (*v*).

The loss of a deed dated subsequently to the commencement of the abstract will not be an objection to the title, if it may be fairly assumed that, if produced, it would not throw any difficulty upon the title.

(*u*) See *infra*, p. 363.

(*v*) *Oliver v. Hinton*, (1899) 2 Ch. 264.

PART V.

RIGHTS OF THE CONTRACTING PARTIES AFTER THE
CONTRACT AND BEFORE COMPLETION.

CHAPTER XIV.

RELATION OF THE CONTRACTING PARTIES.

SECTION 1.

Effect of Contract.

Vendor is Trustee.—Upon a valid contract for sale and purchase being entered into, the vendor becomes a trustee of the estate sold for the purchaser, and he is bound to take reasonable care that the property is not deteriorated in the interval before completion, and while it is in his possession as such trustee.

Thus, it is the duty of the vendor to take steps to prevent the land going out of cultivation (*a*), and to protect the property from injury by trespassers (*b*), and he will be liable for breach of trust even after the conveyance. The purchaser is entitled to have the property preserved pending completion *in its existing state*, and the vendor would not only not be entitled as against the

(*a*) *Egmont v. Smith*, 6 C. D. 469; *Philipps v. Sylvester*, 8 Ch. 173. (*b*) *Clarke v. Ramuz*, (1891) 2 Q. B. 456.

purchaser's desire to determine an existing tenancy, but if he did determine it, he would be liable to the purchaser for any loss thereby accruing (*c*). Inasmuch, however, as he is only a trustee in respect of the property contracted to be sold, he is not a trustee for the purchaser of rents accruing *before the time fixed for completion*, and he is entitled to such rents, and also to the crops and other produce of the soil taken in due course of husbandry.

Moreover, until the whole of the purchase-money has been paid, the vendor is not a mere trustee having no beneficial interest in the property, but his position is something between that of a trustee and a mortgagee (*d*). Thus the vendor has a lien on the property for the unpaid purchase-money, which he retains even after the delivery of possession to the purchaser, and which, after a judicial decree, he may enforce by sale (*e*).

Liability of Vendor for Rent.—After the time fixed for completion, the purchaser is entitled to all the rents and profits of the property, and if the vendor continues to receive them, he must account for them to the purchaser (*f*). Where the vendor remains in actual possession of the premises, he is liable to an occupation rent which, in the absence of express agreement (*g*), will be assessed by the Court. But, in the case of the sale of

(*c*) *Rafferty v. Schofield*, (1897) 1 Ch. 644.

(*d*) *Lysaght v. Edwards*, 2 C. D. 506; *Shaw v. Foster*, L. R., 5 H. L. 321, at p. 338.

(*e*) *Mackrell v. Symmons*, White & Tudor's L. C., Vol. II. 926, and notes thereto. As to lien of the vendor when the purchase-money

is to be paid by instalments, see *Nives v. Nives*, 15 C. D. 649; and as to lien of the purchaser in such a case, see *Cornwall v. Henson*, (1899) 2 Ch. 714.

(*f*) *Sherwin v. Shakespeare*, 5 De G., M. & G. 517.

(*g*) *Metropolitan Rail. Co. v. Defries*, 2 Q. B. D. 189.

trade premises, if, owing to the default of the purchaser, the vendor continues to carry on his business on the premises until the purchase-money is paid, he will not be liable to occupation rent. In such a case the inconvenience suffered by the vendor is so great that the ordinary rule does not apply (*h*).

If the purchaser is to be let into possession *before* completion, this should be provided for by the conditions, as, in the absence of express agreement, he is not liable for rent (*i*).

Property belongs to Purchaser.—A purchaser who has performed his contract up to the time of the event happening, is entitled to the benefit of any improvements to the property or beneficial circumstance which may arise after the date of the contract and before the conveyance to him (*j*), even though such benefits may have arisen through the expenditure of the vendor (*k*). On the other hand, if the vendor has performed his contract up to the time of the happening of the event, any loss or deterioration of the property after the date of the contract and before the conveyance, which is not attributable to the negligence of the vendor, will fall upon the purchaser (*l*), such, for instance, as the destruction of buildings by fire.

Insurance.—Where the property has been insured against fire by the vendor, there is simply a contract to indemnify him by the insurance company, which does not form part of the property contracted to be sold. Consequently, in

- (*h*) *Leggott v. Metropolitan Rail. Co.*, 5 Ch. 716.
(*i*) *Dart, V. & P.*, 290.
(*j*) *Harford v. Purrier*, 1 Madd.

539.
(*k*) *Munro v. Taylor*, 8 Hare, 60.
(*l*) *Poole v. Shergold*, 2 Bro. C. C. 118.

the event of the premises being damaged or destroyed by fire during the interval before completion, although the vendor (at any rate before he has been paid his purchase-money) can sue the insurance office and recover the policy-moneys (*m*), the purchaser cannot, in the absence of express stipulation, claim any interest in the policy-moneys or set them off against the purchase-price (*n*).

On the other hand, if the vendor receives the insurance money from the company, and also the full amount of the purchase-money from the purchaser, the insurance company, on the principle of subrogation, can recover from the vendor out of the purchase-money a sum equal to the insurance money (*o*), and they would probably have this right, even though the vendor had agreed by the conditions of sale to give the purchaser the benefit of the insurance. A policy of fire insurance, unlike a marine policy, is not assignable *as of right* (*p*), and the assignee cannot sue on the policy unless the company has declared its assent to the assignment by a memorandum indorsed on the policy. If the fire occurs *after* the purchase has been completed and the purchase-money paid, neither vendor nor purchaser can sue the company on the policy unless a proper assignment thereof has been made (*q*).

It is submitted that the proper remedy of the purchaser is to require the company to apply the purchase-money in re-instatting the premises. This the purchaser has power

(*m*) *Collingridge v. Royal Exchange Assurance Corporation*, 3 Q. B. D., 173.

(*n*) *Rayner v. Preston*, 18 C. D. 1.

(*o*) *Castellain v. Preston*, 11 Q. B. D., 380.

(*p*) *Sadlers Co. v. Badcock*, 2 Atk. 554.

(*q*) *Ecclesiastical Commissioners v. Royal Exchange Assurance Corporation*, 39 Sol. J., 624.

to do, at any rate within the metropolitan district (*r*), under 14 Geo. III. c. 78, sect. 83, since it seems clear that he is a "person interested" within the meaning of that statute (*s*). He must, of course, make this request before the company have settled with the vendor (*t*).

In order to avoid litigation, however, it is desirable that the purchaser, immediately upon entering into the contract, and thereby obtaining an insurable interest, should himself effect an insurance.

SECTION 2.

Lunacy of the Contracting Parties.

The fact that one of the contracting parties becomes a lunatic during the interval before completion does not avoid the contract, for if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit (*u*). If the vendor becomes a lunatic after the whole of the purchase-money has been paid (*v*), or after the contract has been so acted upon that a decree for specific performance would be a matter of course (*w*), the purchaser should present a petition (*ww*),

(*r*) Lord Westbury held that the Act was of universal application : *Ex parte Gorely*, 4 De G., J. & S. 477 ; but this has been doubted by Lord Watson, in *Westminster Fire Office v. Glasgow Provident Investment Society*, 13 A. C. at p. 716.

(*s*) The application of the Act has been confined to cases between landlord and tenant, and probably does not apply as between mortgagor and mortgagee : see *West-*

minster Fire Office v. Glasgow Provident Investment Society, 13 A. C. at p. 714.

(*t*) *Simpson v. Scottish Union Insurance Co.*, 1 H. & M. 618.

(*u*) *Owen v. Davies*, 1 Ves. sen. 82.

(*v*) *In re Cuming*, 5 Ch. 72.

(*w*) *In re Pagani*, (1892) 2 Ch. 236 ; *Re Brudley*, 54 L. T. N. S. 43.

(*ww*) Now a summons, unless the Judge or Master directs a petition : see Lunacy Rules, 1900.

intituled "In Lunacy," praying for a vesting order under sect. 135 of the Lunacy Act, 1890 (*x*). But where the contract is purely executory, the Court will not make a vesting order until the right to specific performance has been settled by a decree (*y*). In such cases the purchaser must proceed by an action for specific performance in the Chancery Division, and obtain a declaration that the lunatic is a trustee for him of the property (*z*).

The High Court has jurisdiction under the Trustee Act, 1893 (*a*), to appoint a new trustee in the place of a sole surviving trustee who is a lunatic, not so found by inquisition, but where a *vesting order* is required, resort should be had to the Lunacy jurisdiction (*b*).

It must, however, be remembered that the committee of the lunatic's estate has to obtain the sanction of the Court of Lunacy before defending the action (*c*). If the purchaser obtains a decree, it is clearly the duty of the committee or guardian *ad litem* (*d*) to apply to the Court of Lunacy, by summons, for a direction to execute the conveyance to the purchaser (*e*).

By sect. 120 of the Lunacy Act the judge in lunacy may direct the committee to "perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy"; and sect. 124 enacts that the committee shall, in the name of, or on behalf of, the lunatic, execute all such assurances for giving effect to

(*x*) 58 & 59 Vict. c. 5.

(*c*) *Re Manson*, 21 L. J. Ch. 249.

(*y*) *In re Carpenter*, Kay, 418; *In re Colling*, 32 C. D. 333.

(*d*) See R. S. C., Ord. XVI. r. 17; Ord. XIII. r. 1; and Ord. IX. r. 5;

(*z*) *Couper v. Harman*, 57 L. J., Ch. 460.

cf. also Lunacy Act, 1890, s. 116.
(*e*) Cf. *Baldwyn v. Smith*, (1900) 1 Ch. 588.

(*a*) 56 & 57 Vict. c. 58, s. 25.

(*b*) *Re M.*, (1899) 1 Ch. 79.

any order under this Act as the judge directs, and every such assurance shall be valid and effectual, and shall take effect accordingly.

SECTION 3.

Bankruptcy of Contracting Parties.

The bankruptcy of either the vendor or the purchaser will not avoid the contract (*f*), provided that the contract was entered into before a receiving order had been made, and that the other party had no notice of an available act of bankruptcy (*g*).

Disclaimer.—The Bankruptcy Act, 1883, provides (*h*) that when any part of the property of the bankrupt consists of *unprofitable contracts*, the trustee in bankruptcy, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto, may, by writing signed by him at any time within twelve months after the first appointment of a trustee, disclaim the property. Provided that when any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within twelve months after he first became aware of it.

The disclaimer operates as from the date of disclaimer (*i*)

(*f*) Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 49, sub-s. (d). (*h*) 46 & 47 Vict. c. 52, s. 55, sub-s. 1, as varied by s. 18 of the

(*g*) But see *infra*, p. 281, as to repudiation by the purchaser. (*i*) *Ib.* s. 55, sub-s. 2.

and the only remedy of the other contracting party is to prove in the bankruptcy as a creditor for the injury which he has suffered by the disclaimer (*j*).

The other contracting party may, however, make an application in writing to the trustee requiring him to decide whether he will disclaim or not; and if, after the period of twenty-eight days, or such extended period as may be allowed by the Court, the trustee does not give notice of his intention to disclaim, *he will be deemed to have adopted the contract (k)*.

SECTION 4.

Death of Contracting Parties.

The death of either party will not avoid the contract.

Death of Vendor.—If the vendor dies before completion, and there is a binding contract (*l*), the purchase-money forms part of his personal estate, and his legal personal representatives can give a valid discharge for it (*m*).

By sect. 4 of the Conveyancing Act, 1881, the legal personal representatives of the vendor have power to "convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract."

Copyholds.—This section, however, only applies to contracts for the sale of the fee simple or other freehold interest in land descendible to heirs general. If the land

(*j*) 46 & 47 Vict. c. 52, s. 55, 166.
sub-s. 7.

(*k*) *Ib.* s. 55, sub-s. 4.

(*l*) *In re Thomas*, 34 Chanc. D.

(*m*) *Fletcher v. Ashburner*, 1 White & Tudor's L. C. 327, and notes thereto.

contracted to be sold is *copyhold*, the legal estate therein will pass under a devise of trust estates in the vendor's will (*n*), but in the absence of such a devise will descend to the vendor's customary heir, and if the customary heir is an infant, the purchaser must apply to the Court for a vesting order (*o*).

Tenant for Life.—If the vendor was tenant for life, and entered into the contract in pursuance of a power in the settlement, the contract can be enforced by or against the remainderman (*p*) or the trustees of the settlement (*q*). So, too, if the vendor contracts as tenant for life under the Settled Land Acts, the contract is enforceable *against* and *by* every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor" (*r*).

Death of Purchaser.

On the death of the purchaser before completion, his heir or devisee is equitably entitled to the property which is the subject of the contract, provided that the contract is a binding one (*s*): and he can enforce specific performance against the vendor.

A general or residuary devise contained in a will made since the passing of the Wills Act, will pass land contracted to be purchased by the testator after the date of the will (*t*).

(*n*) *Lysaght v. Edwards*, 2 C. D. 499.

(*o*) *Re Beaufort's Will*, (1898) W. N. 148.

(*p*) *Shannon v. Bradstreet*, 1 S. & L. 52.

(*q*) *Davis v. Harford*, 22 C. D. 128.

(*r*) 45 & 46 Vict. c. 38, s. 31, sub-s. (2).

(*s*) *Buckmaster v. Harrop*, 7 Ves. 341.

(*t*) 1 Vict. c. 26, s. 24; but as to "contrary intention," see *supra*, p. 136.

Locke King's Acts.—Formerly, the heir or devisee was entitled to have the purchase-money discharged out of the purchaser's personal estate (*u*) ; but now, since the Locke King's Amendment Acts of 1867 (*v*) and 1877 (*w*), the unpaid purchase-money must be deemed to be a sum charged on the land by way of mortgage within the meaning of the principal Act (*x*) ; and these enactments apply to the sale of leaseholds as well as of freeholds and copyholds (*y*).

The purchase-money, which, in the eyes of equity, is converted into realty by the contract of sale, is re-converted into personality by the statute. The result, therefore, is that the heir or devisee of the purchaser is entitled to the land charged with the unpaid purchase-money ; if he seeks to enforce specific performance, he must pay the purchase-money out of his own pocket (*z*) ; and if he agrees with the vendor to rescind the contract, he is entitled to nothing (*a*). It must, however, be remembered that the Locke King's Acts do not apply in the case of the devisee of a purchaser where there is evidence of a contrary intention on the part of the testator (*b*), nor in any case where the vendor has *no lien* for unpaid purchase-money (*c*).

Where the vendor sought to enforce specific performance after the death of the purchaser, it was the practice,

(*u*) *Holt v. Holt*, 2 Vern. 322.

(*v*) 30 & 31 Vict. c. 69.

(*w*) 40 & 41 Vict. c. 34.

(*x*) 17 & 18 Vict. c. 113.

(*y*) *In re Kershaw*, 37 C. D. 674.

(*z*) *In re Kidd*, (1894) 3 Ch. 558.

(*a*) *In re Cockcroft*, 24 C. D. 94.

(*b*) As to evidence of contrary intention, see *In re Fleck*, 37 C. D. 677 ; *In re Campbell*, (1893) 2 Ch.

206.

(*c*) *In re Cockcroft*, 24 C. D. at p. 100.

prior to 1877, to make both the real and personal representatives of the purchaser defendants to the action (*d*). It is submitted that this is still the correct procedure, even where the contract is under seal (*e*), since it is clear that the devisee may disclaim the devise (*f*), and that the heir cannot be liable to pay the purchase-money where he has no assets by descent (*g*). In any case it is desirable to make a distinct alternative claim against the personal representatives for damages for breach of contract.

(*d*) Fry on Specific Performance, p. 93; Dart, V. & P. 1132.

(*e*) Cf. C. A., 1881, s. 59.

(*f*) Cf. Lord Chief Baron Richards, in *Townsend v. Champnourne*, 9

Price, 133: "The devisee is not bound to take the estate if *damnona haereditas*."

(*g*) Cf. *Fitzgerald v. Fitzgerald*, 1 Ir. C. L. R. 347. .

CHAPTER XV.

REPUDIATION BY PURCHASER.

IT is not absolutely necessary that the title of the vendor should be perfect at the time the contract is entered into, provided he is able to perfect it before completion ; and specific performance has been decreed at the instance of vendors having an imperfect title, who contracted under the *bond fide* belief that they could make a good title at the time fixed for completion, and which they eventually became in a position to do (a).

Repudiation before Time fixed for Completion.—Nevertheless, the purchaser is not bound to wait until the vendor has acquired a good title ; but if he finds that the vendor, when he made the contract, had *no right* to the property, he may repudiate the contract even before the time fixed for completion (b). In *Forrer v. Nash* (c), Lord Romilly stated the law on this point as follows :—“ When a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say ‘ I will have nothing to do with it.’ The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the

- (a) *Hoggart v. Scott*, 1 Russ. & M. 293 ; *Wilson v. Dunn*, 34 C. D. 569.
 (b) *Brewer v. Broadwood*, 22 C. D. 105 ; *Bellamy v. Debenham*, (1891) 1 Ch. 412.
 (c) 35 Beav. 171 ; *Smith v. Butler*, (1900) 1 Q. B. at p. 700.

power) to join in making a good title to the property sold."

Upon this principle it has been held that where the purchaser discovers that the vendor has committed an act of bankruptcy, he may at once repudiate the contract without waiting to see whether a bankruptcy petition will be presented within three months (*d*), but it is submitted that this decision would not apply if the time fixed for completion is more than three months after the date of the act of bankruptcy (*e*). Again, when the contract is subject to a condition that the vendor shall procure the consent of some third party, there are at least four cases in which the purchaser is not bound to wait until the date fixed for completion, viz.: (1) where the purchaser can show by sufficient evidence that the condition cannot be practically fulfilled by the date fixed; (2) where the vendor has practically admitted that the condition is incapable of fulfilment; (3) where there is an agreement, express or implied, between vendor and purchaser that a particular refusal of the third party shall be taken as conclusive; and (4) where the refusal of the third party is so treated by the vendor as to justify the purchaser in regarding the matter as at an end (*f*). In every case, however, it is more prudent for the purchaser to wait until the date of completion has passed before repudiating.

When Purchaser must wait until the Time for Completion.

A distinction has been made between the case of a vendor who has no interest whatever in the property, where, as we have seen, the purchaser can repudiate

(d) <i>Powell v. Marshall Parkes & Co.</i> , (1899) 1 Q. B. 710.	s. 43. (f)
(e) <i>S. v. Bellamy's Estate</i> , 1892.	R.

(f) *Smith v. Butler*, (1900) 1 Q.

(e) See Bankruptcy Act, 1883, B. at p. 699.

before the time fixed for completion, and the case of a vendor having only a partial interest, who has contracted to sell the fee simple. If a vendor, who, at the time when he sells, has only a partial interest, as, for instance, a tenant for life (*g*), or a tenant by the courtesy (*h*), affects to sell the fee simple, the Court will enforce that contract, provided that before the time fixed for completion he can get in the whole fee simple, and so acquire the power of carrying out his contract (*i*).

On the other hand, a purchaser is not bound to accept a different title to that which he agreed to take. Thus, where a purchaser has contracted to buy property from trustees selling under a power of sale, he cannot be compelled to accept a title from the tenant for life under the Settled Land Acts (*j*), nor from the trustees themselves with the concurrence of all the beneficiaries (*k*), at any rate, after the time fixed for completion has expired (*l*). Thus when at the time fixed for completion the vendor who had contracted to sell a lease could only show a title to an under-lease and had no power to get in the head-lease, the purchaser was held justified in repudiating the contract (*m*).

**When the Purchaser must wait a reasonable time after
the Time for Completion.**

If the defect discovered by the purchaser is a defect of *conveyance* and not a defect of *title*, the purchaser is

- (*g*) *Salisbury v. Hatcher*, 2 Y. & C. C. C. 62.
- (*h*) *Murrell v. Goodyear*, 1 D. F. & J. 432.
- (*i*) *In re Bryant and Barningham's Contract*, 44 C. D. 221 and 228.
- (*j*) *In re Bryant and Barningham's*
- Contract, 44 C. D. 218.
- (*k*) *In re Head's Trustees and Macdonald*, 45 C. D. 310.
- (*l*) *Ib.*, at p. 317.
- (*m*) *Warren v. Moore*, 14 T. L. R. 497, and cf. *Halifax Commercial Bank v. Wood*, 79 L. T. 538.

not entitled to repudiate at once, even though the time fixed for completion has passed.

In such a case, the proper course for the purchaser to pursue is to give the vendor a reasonable time to remedy the defect, and to inform the vendor that if the defect is not remedied in reasonable time, he will repudiate the contract (*n*).

Should the abstract not be delivered within the time stipulated for its delivery, or where no time has been named by the contract, within a reasonable time before the day fixed for completion, if it is the intention of the purchaser to avoid the contract on this ground, the solicitor should object to receive, or at once return it (*o*). The proper course for the purchaser in such a case is to give the vendor notice that if a proper abstract is not delivered within a reasonable period, *e.g.*, fourteen days, he will treat the contract as at an end (*p*).

What amounts to Repudiation.

In the absence of any *express* repudiation by the purchaser, an intention to repudiate may be inferred from his conduct. But mere delay, although sufficient to deprive him of the right to specific performance, will not as a rule be construed as amounting to repudiation, and where part of the purchase money has been paid, the Court will be very reluctant to hold that the purchaser has repudiated the contract (*pp*).

(*n*) *Hatton v. Russell*, 38 C. D. 384. As to what are defects of conveyance see *supra*, pp. 216-217.

(*o*) *Dart, V. & P.* 347.

(*p*) *Compton v. Bagley*, (1892) 1 Ch. 313.
(*pp*) *Cornwall v. Henson*, (1900) 2 Ch. 298.

CHAPTER XVI.

REMEDIES BY WHICH THE CONTRACT CAN
BE ENFORCED.

SECTION 1.

Distinction between the Different Remedies.

PRIOR to the Judicature Act, there were two remedies open in case of a breach of contract for the sale of land, viz., an action for damages in the Courts of common law, or the extraordinary remedy of a suit for specific performance in the Court of Chancery. Lord Cairns' Act (*a*) enabled the Court of Chancery to give damages as a substitute for specific performance. This Act has since been repealed (*b*), but the repeal does not affect the jurisdiction of the Court (*bb*).

Since the Judicature Act, law and equity are concurrently administered in all the divisions of the High Court, but the nature of these two remedies remains unaltered, and it is important to bear in mind the distinction between them. Thus, there are many cases in which a vendor, who would fail in an action for specific performance, may yet obtain damages for breach of contract; as, for instance, where the purchaser has repudiated the contract, and the vendor has sold at a loss to a third party. On the other

(*a*) 21 & 22 Vict. c. 27.

(*bb*) *Sayers v. Collyer*, 28 C. D.

(*b*) Statute Law Revision Act, 103.

hand, we have seen that a purchaser who contracts subject to conditions as to title, is bound by those conditions unless they are misleading (*c*). Consequently, even although he discover that the vendor's title is positively bad, he cannot recover his deposit and costs of investigation, either by an action for breach of contract (*d*) or by a summons under sect. 9 of the Vendor and Purchaser Act (*e*). But if the vendor seeks to enforce specific performance of the contract, we come to an entirely different region of law, for the remedy of specific performance is subject to the discretion of the Court. Where the vendor can give a good holding title, although it may not be a satisfactory title, from the point of view of a strict conveyancer, the Court, in the case of contracts subject to stringent conditions as to title, will enforce specific performance (*f*). But if the vendor has a mere semblance of a title, where in fact the purchaser would not get the land which he has contracted to buy, but would be liable to be immediately ejected, the Court has in no recorded instance enforced specific performance (*g*).

The principle is clearly laid down that the Court will not compel the purchaser *to purchase a law-suit*. "The Court cannot force on anybody a title which it is evident will involve the taker in immediate litigation" (*h*). Upon the same principle it has been held that a purchaser cannot be compelled to accept a title which involves *con-*

(*c*) See *supra*, p. 228.

337; *Saxby v. Thomas*, W. N., (1891), 4, 28.

734; *Best v. Hamand*, 12 C. D. 1.

(*g*) *In re Scott and Alvarez's Contract*, (1895) 2 Ch. 603.

(*e*) *National and Provincial Bank v. Marsh*, (1895) 1 Ch. 190.

(*h*) *Pegler v. White*, 33 Beav. 408.

(*f*) *Hume v. Bentley*, 5 De G. & Sm. 520; *Duke v. Barnett*, 2 Coll.

troverted facts, estoppel, or acquiescence (i), as, for instance, whether a previous purchaser bought without notice of a restrictive covenant (j), or whether a lessor is justified in refusing a licence to assign (k).

If the vendor elects to bring an action for specific performance, he cannot, at the trial, amend his pleadings so as to change the whole nature of his action, and turn it into an ordinary action for damages at common law (l). It is presumed, however, that a claim may be framed in such a way as to make a distinct alternative claim for damages for breach of contract, in addition to a claim for specific performance (m). So, too, in an action for specific performance, the vendor cannot at trial obtain an order for rescission of the contract and forfeiture of the deposit unless there is an alternative claim in the pleadings (n).

Moreover, if the vendor after obtaining a decree for specific performance moves to have the contract rescinded, he cannot claim damages against the purchaser (o); and it even seems doubtful whether he can recover the costs of the specific performance action (p).

SECTION 2.

Damages for Breach of Contract.

Action by Vendor.—If the purchaser refuses to perform his part of the contract, the vendor can either rescind the

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| <i>(i) Re New Land Development Association,</i> (1892) 2 Ch. 148.
<i>(j) Nottingham Patent Brick Co.</i>
16 Q. B. D. at p. 787.
<i>(k) Re Marshall and Salt,</i> (1900) 2 Ch. 202; but cf. <i>White v. Hay</i> , 72 L. T. 281.
<i>(l) Hippgrave v. Cuse,</i> 28 C. D. 856; <i>Nicholson v. Brown</i> , W. N., | 1897, 52.
<i>(m) S. C.</i> , at p. 361.
<i>(n) Stone v. Smith</i> , 35 C. D. 188; <i>Kingdon v. Kirk</i> , 37 C. D. 141.
<i>(o) Henty v. Schroder</i> , 12 C. D. 606.
<i>(p)</i> See decisions of North, J., in <i>Jeffry v. Stewart</i> , 80 L. T. 17, and two previous cases <i>sed quære</i> . |
|---|---|

contract and sue the purchaser on a *quantum meruit* for expenses incurred (*q*), or can bring an action for general damages actually sustained by the breach of contract (*r*).

It should, however, be borne in mind that the doctrine of part performance does not enable the Court to award damages on a parol contract in a case where the Court could not have given specific performance (*s*).

If there is a distinct refusal by the purchaser to be bound by the terms of the contract (although such repudiation is prior to the time fixed for completion), the vendor can, if he pleases, treat the contract as rescinded, and at the same time sue for damages (*ss*).

Where there is a condition enabling the vendor to forfeit the deposit, the usual course pursued by the vendor is to forfeit the deposit and re-sell the property. In that case he can recover from the purchaser the deficiency on the re-sale, but in assessing such deficiency he must take into consideration the amount of the deposit (*t*).

Action by Purchaser.—On the other hand, if the vendor makes default, the purchaser can either rescind the contract and sue the vendor for the deposit, or he can bring an action for damages on the ground of non-performance (*u*).

It has, however, been established by the “rule in *Flureau v. Thornhill*” (*v*), that, upon a contract for the purchase of real estate, if the vendor, *without fraud*, is

(*q*) *Dc Bernardy v. Harding*, 8 Ex. 822.

(*r*) *Laird v. Pim*, 7 M. & W. 474.

(*s*) *Lavery v. Pursell*, 39 C. D. 5.

(*ss*) See doctrine of *anticipatory*

breach, explained in *Johnstone v. Milling*, 16 Q. B. D. 460.

(*t*) *Ockenden v. Henley*, 27 L. J. Q. B. 361.

(*u*) *Dart, V. & P.* 1071, 1072.

(*v*) 2 W. Bl. 1078; see also *Tyrer v. King*, 2 Car. & K. 149.

incapable of making a good title, the intended purchaser is not entitled to any compensation for *the loss of his bargain*. If the vendor is guilty of fraud, the purchaser can, of course, recover damages by an action for deceit (*w*).

It was formerly considered that this rule was subject to two exceptions, viz: (1) where the vendor at the time of entering into the contract knew he had no title (*x*); and (2) where the breach of contract arose, not from the inability of the vendor to give a good title, but from *his refusal to take the necessary steps to carry out the contract* (*y*). These exceptions were doubted by Lord Chelmsford and Lord Hatherley in *Bain v. Fothergill* (*z*) and Lord Chelmsford stated his opinion that "the limits within which damages may be recovered upon the breach of a contract for the sale of real estate must be taken to be *without exception*." But the decision of the Court of Appeal (*a*) in *Day v. Singleton* establishes that the second exception is still good law. The rule which limits damages is an anomalous rule, based upon and justified by difficulties in showing a good title to real property in this country, and ought not to be extended to cases in which the reasons on which it is based do not apply (*b*).

Although, however, the purchaser is not entitled to damages for loss of his bargain, he can recover his deposit together with interest, the expenses incurred in the investigation of the vendor's title, and the costs of drawing the contract of sale (*c*).

(*w*) *Bain v. Fothergill*, L. R., 7 H. L. at p. 207.

(*z*) L. R., 7 H. L. 158.

(*x*) *Hopkins v. Grazebrook*, 6 B. & C. 31.

(*a*) 1899, 2 Ch. 320.

(*y*) *Engel v. Fitch*, L. R., 4 Q. B.

(*b*) *Ib.* at p. 329.

Pearl Life Assurance Co. v. Buttinsiar, W. N. (1898), 123.

A distinction seems to have been made between ordinary damages, and damages *in the nature of compensation*, which are given in actions for specific performance in accordance with the established practice of the Court of Chancery (*d*). Thus, in actions for specific performance, whether brought by the vendor or the purchaser, the purchaser can recover damages in respect of loss occasioned by the vendor's delay in performing his contract (*e*).

The measure of such damages is arrived at by considering "what may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract" (*f*).

SECTION 3.

Summons under the Vendor and Purchaser Act.

The Vendor and Purchaser Act, 1874 (*g*), provides that a vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times, and from time to time, apply in a summary way to a judge of the Court of Chancery in England in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of, or connected with, the contract (*not being a question affecting the existence or validity of the contract*); and

(*d*) *Phelps v. Prothero*, 7 D. M. & G. at p. 784. (*e*) *Building Society v. Bonash*, 35 C. D. 390.

(*e*) *Jacques v. Millar*, 6 C. D. 153; (*f*) *Jacques v. Millar*, 6 C. D. 160. (*g*) 37 & 38 Vict. c. 78, s. 9.

the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid. A vendor or purchaser of real or leasehold estates in Ireland or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland; and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

What Questions Decided.—The object of this section is to enable either vendor or purchaser to obtain the decision of the Court upon some *isolated point*, instead of being compelled to have recourse to an action for damages or specific performance. Questions whether the vendor has shown a good title (*h*), or has sufficiently answered the purchaser's requisitions, to what interest (if any) on the purchase-money the vendor is entitled, or whether, owing to the conduct of one of the parties, the other party is entitled to rescind the contract (*i*), are now decided upon vendor and purchaser summons.

An isolated point, such as the form of the conveyance, may be dealt with on a vendor and purchaser summons, even although the respondent asserts that he is in a position altogether to repudiate the contract (*j*).

Jurisdiction of the Court.—The Court has no jurisdiction

(h) Cf., however, dicta of Keke-
wich, J., in *Re Wallis and Barnard*,
(1899) 2 Ch. 519-520.

Contract, 37 C. D. 44.

(j) *Re Hughes and Ashley*, (1900)
2 Ch. 595.

(i) *In re Jackson and Woodburn's*

on an application of this kind to award special damages, or damages in the nature of compensation, as, for instance, where the purchaser has suffered loss owing to the vendor's delay in completion (*k*).

The Act, however, empowers the judge to "make such order as to him shall appear just," that is to say, to direct such things to be done as are the natural outcome of his decision. Consequently, the Court can order the return of the deposit to the purchaser with interest from the time when it was made (usually at 4 per cent.), and also can give the purchaser the costs of investigating the vendor's title (*l*).

SECTION 4.

Specific Performance.

Specific performance of the contract will be enforced at the instance of either vendor or purchaser if there be a valid contract, and such as, having regard to the circumstances, ought to be enforced.

Mistake and Unfairness.—Any circumstance of *unfairness* on the part of the plaintiff or those under whom he claims, or even any circumstance of *hardship* in the defendant's situation, will incline the Court not to grant this special equitable relief, but to leave the party to his legal remedy in damages (*m*).

Thus, not only is fraud or material misrepresentation on the part of the plaintiff a good defence to an action of

(k) *In re Wilson and Stevens' Contract*, (1894) 3 Ch. 546.
 (l) *In re Hargreaves and Thompson's Contract*, 32 C. D. 454.
 (m) *Gould v. Kemp*, 2 M. & K. 308.

this character, but the defendant will not be compelled to perform a contract which he entered into under a reasonable misapprehension as to its effect. In such a case it is generally necessary for the defendant to show that the mistake was contributed to by the plaintiff, however unintentionally, as, for instance, that there was in the description of the property a matter on which a person might *bond fide* make a mistake (*n*). Moreover, he must show that he exercised a reasonable amount of care to ascertain what he was buying (*o*).

A written contract cannot be impeached simply because one of the parties to it put an erroneous construction on the words in which the contract is expressed (*p*), unless the mistake is induced by the conduct of the other party (*q*). But if the plaintiff is mistaken in the construction of an agreement, he may waive his construction and obtain specific performance according to the construction admitted by the defendant (*r*).

In any case, however, the Court will refuse specific performance if the plaintiff "snapped at an offer which he must have perfectly well known to be made by mistake" (*s*).

Hardship.—It must not be supposed that in every case of hardship the Court will refuse to grant specific performance, and in one case Lord Romilly pointed out that

(*n*) *Swaisland v. Dearsley*, 29 Beav. 430; *Baskcomb v. Beckwith*, 8 Eq. 100.

(*o*) *Tamplin v. James*, 15 C. D. 215.

(*p*) *Stewart v. Kennedy*, 15 A. C. 108.

(*q*) *Wilding v. Sanderson*, (1897) 2 Ch. 534.

(*r*) *Preston v. Luck*, 27 C. D. 497.

(*s*) *Webster v. Cecil*, 30 Beav. 62; *Tamplin v. James*, 15 C. D. 221.

"you cannot exercise a discretion by merely considering what as between the parties would be fair to be done; what one person may consider fair, another person may consider very unfair" (*t*). The cases in which the Court has refused specific performance on the ground of hardship may, it is submitted, be classed under four heads, viz.:

- (1) Where to decree specific performance would compel the defendant to commit a breach of duty, e.g., a breach of trust, or a breach of contract (*u*).
 - (2) Where the execution of the contract would render the defendant liable to forfeiture (*v*). .
 - (3) Where the contract if enforced would render the purchaser liable to criminal proceedings, or subject him to obloquy (*w*).
 - (4) Where the purchaser would be buying a law-suit (*x*).

Parol Variation.—If the defendant signed the contract of sale upon the faith of a parol undertaking by the plaintiff which varied the terms of the written agreement, this undertaking may be set up as a defence to an action for specific performance (*y*). It seems, however, that a parol variation which is contemporaneous with the contract is not admissible (*z*).

(t) *Haywood v. Cope*, 25 Beav. 151.
 (u) *Wilmott v. Barber*, 15 C. D. 96.
 (v) Fry on Specific Performance, p. 200.
 (w) *Hope v. Walter*, (1900) 1

Ch. 257.
 (x) Fry, p. 408, and see ante
 p. 285.
 (y) *Hammersley v. De Biel*, 12 C.
 & F. 45.
 (z) *Omerod v. Hardman*, 5 Ves.
 730.

It must be remembered that there is a well-established distinction between a person seeking and a person resisting specific performance. The defendant, as we have seen, may adduce parol evidence to show fraud or mistake, but the plaintiff cannot do so for the purpose of obtaining specific performance with a variation (*a*).

This rule, however, only applies to cases of *unilateral* mistake, the remedy for which is rescission and not rectification (*b*), and does not apply to a mistake *common to both parties*, when the proper remedy is to rectify by substituting the terms really agreed to. Thus, if the Court is satisfied that there has been a mutual mistake, and there has been such a part performance as to take the contract out of the Statute of Frauds, the Court will rectify the mistake and enforce specific performance of the contract as rectified (*c*).

Although parol evidence is not as a rule admissible to vary the terms of a written contract, it is always admissible for the purpose of showing that there was no agreement at all (*d*).

SECTION 5.

Partial Specific Performance.

The general rule of specific performance is, that the purchaser shall have what the vendor can give, with an abatement out of the purchase-money for so much as the

(*a*) *Woollam v. Hearn*, Wh. & T. L. C., Vol. II., and notes thereto; *May v. Platt*, (1900) 1 Ch. 622.

(*b*) *Paget v. Marshall*, 28 C. D. 255.

(*c*) *Olley v. Fisher*, 34 C. D. 367; *Shrewsbury & Talbot Cab Co. v. Shaw*, 89 L. T. J. 274.

(*d*) *Pattle v. Hornibrook*, (1897) 1 Ch. 25.

quantity falls short of the representation (*e*). Thus, where there is any defect in the *quantity* or *quality* of the land sold, the purchaser is generally entitled to specific performance with compensation, whether there is a condition as to compensation or not. Upon the same principle, if a vendor having only a partial interest, such as a life estate, *acts as an absolute owner*, and contracts to sell the fee simple, the purchaser can compel him to convey such estate as he possesses, and can enforce a partial performance of the contract with an abatement in the purchase-money (*f*). The difficulty in such a case is to ascertain what is a just price.

Where the bargain between the parties contains no provision for compensation, or such provision does not apply, the Court will not enforce partial specific performance in the following cases :—

- (1) Where there is no evidence of improper conduct or misrepresentation on the part of the vendor (*g*).
- (2) Where the purchaser knew of the limited interest of the vendor (*h*).
- (3) Where performance of the contract would be unreasonable or prejudicial to other persons interested in the property (*i*).
- (4) Where it is impossible to assess the compensation (*j*).

(*e*) *Hill v. Buckley*, 17 Ves. 394.

(*f*) *Thomas v. Dering*, 1 Keen 729; *Mortlock v. Buller*, 10 Ves. 815.

(*g*) *Price v. Griffiths*, 1 D. M. & G. 80; *Lumley v. Ravenscroft*, (1895) 1 Q. B. 683.

(*h*) *Hopcroft v. Hopcroft*, 76 L. T. 341.

(*i*) *Thomas v. Dering*, 1 Keen at p. 747.

(*j*) *Rudd v. Lascelles*, (1900) 1 Ch. 815.

PART VI.

OF COMPLETION AND MATTERS RELATING THERETO.

CHAPTER XVII. OF ASSURANCES TO PURCHASERS.

SECTION 1.

Preparation of Assurances.

HAVING investigated the title of the vendor to the estate proposed to be dealt with, the assurance thereof to the purchaser should next be considered.

Estates of freehold tenure are conveyed by deed of grant.

Estates of leasehold tenure are transferred by deed of assignment.

Estates of copyhold tenure are assured by means of surrender into the hands of the lord of the manor of which the same are holden, and admittance of the purchaser in terms of such surrender.

The contract usually stipulates that the costs of the preparation of the assurance to the purchaser and of all matters connected therewith shall be borne by him, though in the absence of such a stipulation the purchaser is bound to bear the expense, and in the case of an estate of copyhold tenure both of the surrender and admittance.

The preparation of the conveyance or assignment will not operate as a waiver of objections to or requisitions upon the title (*a*), and it is usually prepared before search is made for incumbrances, such search being in fact usually made immediately preceding the completion of the purchase; and it is submitted that notwithstanding the contract may provide that all objections to or requisitions upon or in respect of the title shall be made within a specified time, still, in the event of any incumbrance being discovered upon search being made after that period, the purchaser is entitled to take objection in respect thereof, the abstract of title being rendered imperfect by the non-disclosure thus discovered (*b*). But the assurance should not be prepared until the deeds have been produced.

SECTION 2.

As to the Parties making the Assurance.

The first matter which will suggest itself when the estate is of freehold or leasehold tenure will be the parties to the conveyance or assignment, by which the same and all outstanding interests therein are to be conveyed or transferred.

The estate may be vested in trustees for sale or in a mortgagee or other parties occupying a fiduciary capacity, deriving their power of sale under some or one of the Acts to which reference has been made, or the vendor may have contracted to sell subject to or discharged from

(*a*) *Burroughs v. Oakley*, 3 Sw. 159. *Want v. Stallibrass*, L. R., 8 Ex. at p. 185.

(*b*) *Dart, V. & P.* 180; and see

certain incumbrances, or by reason of marriage he or she may be unable alone to make a valid assurance; or the vendor may be in a position to execute a valid assurance without the consent or concurrence of any other person.

Should the estate be vested in a trustee or trustees for sale, it will of course have been ascertained in the investigation of the title that the events have taken place upon the happening of which the power of sale was exerciseable, and that the necessary consents, if any, to the exercise thereof have been obtained, and that the parties executing the power have full and complete authority conferred upon them by the instrument creating the trust or by statutory enactment.

If the vendor is a mortgagee duly exercising a power of sale conferred by his mortgage deed, or by the Conveyancing and Law of Property Act, 1881, he cannot, of course, be required to procure the concurrence of the mortgagor.

If the estate is at the time of the contract subject to but sold discharged from incumbrances, such incumbrances must, as we have seen, be discharged by a separate deed at the vendor's expense, or if the incumbrancers concur in the assurance to the purchaser, the vendor must bear the additional expense thereby occasioned, and the same rule applies to any outstanding estate or interest.

Upon the sale of a bankrupt's estate, he usually joins in the conveyance and covenants for title, and the Bankruptcy Act, 1883, directs that the bankrupt shall execute such conveyances, &c., and do all such acts and things

in relation to his property as may be reasonably required by the trustee. It is, however, questionable whether there is really any advantage in making the bankrupt a party (*c*).

In the case of a conveyance by a liquidator of a company, under sects. 95 and 133 of the Companies Act, 1862, the company must always be made a party, but the sanction of the Court or Committee of Inspection is now unnecessary (*cc*).

In cases not coming within the Married Women's Property Act, 1882 (*d*), should the vendor be a married woman, the deed must be acknowledged by her under the Fines and Recoveries Act, and her husband should also join in the conveyance (*e*); but, as we have seen, women married after the 31st of December, 1882, are entitled to have, hold and dispose of all real and personal property which shall belong to them at the time of marriage, or which shall be acquired by or devolve upon them after marriage (*f*).

If the contract stipulates that certain persons shall join in the conveyance, whose consent is, in fact, unnecessary, the vendor cannot on that account decline to procure their concurrence (*g*).

SECTION 3.

As to the Parties to whom the Assurance is made.

Having come to a conclusion as to the parties from whom the estate and interest in the property is to be

(*c*) Dart, V. & P. 583.

(*e*) 3 & 4 Will. IV., c. 74, s. 77.

(*cc*) Companies Winding-Up Act, (1890), s. 12, sub-s. 2.

(*f*) 45 & 46 Vict. c. 75, s. 5; and see *supra*, p. 45.

(*d*) 45 & 46 Vict. c. 75.

(*g*) *Benson v. Lamb*, 9 Beav. 402.

divested, the next consideration will be the party or parties in whom the estate is to be vested.

How Conveyed.—A purchaser is entitled to have the property conveyed as he pleases and to whom he pleases; and so long as he does not increase the burden cast upon the original vendor, he may have it in any number of lots and to any number of persons. The vendor cannot object to convey on his being paid the additional expense occasioned by his joining in several conveyances instead of one, but it seems doubtful whether he could be asked to keep his legal estate for a long period and convey it in portions at various times (*h*).

Purchase in Name of Another.—If an assurance is made to a person who does not actually pay the purchase-money, a trust is thereby implied in favour of the person paying the amount, and parol evidence to prove that such is the case will be admitted in a Court of Equity. If, however, the purchase be taken in the name of a wife, child or children, grandchild or illegitimate child, or any person towards whom the purchaser stands *in loco parentis*, it will be assumed that the purchase was intended as an advancement, unless evidence is produced to negative such a presumption (*i*).

Partners.—When real estate is purchased for partnership purposes it will be desirable to take the conveyance unto and to the use of the partners, as joint tenants at law, upon trust for such partners as part of the personal estate of the partnership according to the shares and interests of the partners therein.

(*h*) *Egmont v. Smith*, 6 C. D. 469.

(*i*) See *Dyer v. Dyer*, Wh. & T. Vol. 1., and notes thereto.

But if the conveyance be made to the partners as joint tenants merely, though there would be a survivorship at law in case of the death of either of them, still, in equity the survivor would hold the share of the deceased partner in the estate as a trustee for his representatives (*j*) ; and the same rule would apply to a purchase by two or more for the purpose of a joint speculation (*k*).

Joint Tenants.—When a purchase is made by trustees for the purposes of their trust, the property is vested in them as joint tenants ; and in the case of a mortgage to trustees, it is usual to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees are entitled to the mortgage money on a joint account (*l*).

In all cases where land is conveyed on sale to more than one person so as to create a joint tenancy, if the purchase-money has been advanced by them in equal shares, such joint tenancy will exist both at law and in equity (*m*) ; but if the purchase-money be paid in unequal proportions, the purchasers would be entitled in equity to the property in the shares in which the purchase-money was paid by them (*n*).

Tenants by Entireties.—If land is conveyed to a *husband and wife*, they no longer take as tenants by *entireties*, but as joint tenants, the wife's interest belonging to her for

(*j*) *Morris v. Barnett*, 3 Y. & J. 384, and cf. 53 & 54 Vict. c. 39, s. 20.

D. 720.

(*m*) *Aveling v. Knipe*, 19 Ves. 441.

(*k*) *Lake v. Craddock*, Wh. & T. L. C. Vol. I.

(*n*) *Lake v. Gibson*, 1 Eq. Ca. Ab. 291 ; and Sugd. V. & P., 11th ed., 902.

(*l*) *In re Harman and Uxbridge & Rickmansworth Rail. Co.*, 24 C.

her separate use ; but if land is conveyed to a husband and wife and a *third party*, as between them and such third party, the husband and wife are regarded as one person, and only take a moiety of the estate (*o*).

Prior to the Act to amend the Law of Real Property, when a deed was in the form of an indenture, every person taking any immediate benefit under it was made a party thereto. But that Act (*p*) provides that under an indenture an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture ; also that a deed purporting to be an indenture shall have the effect of an indenture, although not actually indented (*q*).

SECTION 4.

Recitals.

Following the parties to the assurance will be the recital of such facts and circumstances as are necessary to explain the position and interests of the parties executing the instrument ; thus, if the vendor is seised in fee, the fact of his seisin will be recited, and that he has contracted with the purchaser for sale of the estate, which will be sufficient without referring to any contract previously entered into between the parties, whether the sale was by auction or otherwise.

(*o*) *In re Jupp*, 89 C. D. 148 ;
Thornley v. Thornley, (1893) 2 Ch. 229.

(*p*) 8 & 9 Vict. c. 106.

(*q*) 8 & 9 Vict. c. 106, s. 5, which repealed 7 & 8 Vict. c. 76, s. 11, which was a similar provision.

If the vendor possesses a power of appointment over the estate which it is intended shall be exercised by him, the instrument creating the power should be recited.

If the sale is by a mortgagee or trustee in exercise of a power of sale, the instrument creating the power should be recited, and the material parts of the power set out *verbatim*.

If the sale is effected by a mortgagor and mortgagee, it will be sufficient to recite that the mortgage has been effected, that the money remains owing on the security, and that the mortgagor and mortgagee have contracted with the purchaser for the sale to him of the estate.

If incumbrancers join in the conveyance to release or discharge the property from their charges thereon, the nature of such charges and the documents creating them must be recited; or should the estate sold be subject to outstanding charges or incumbrances, the documents effecting them should also be recited.

If the estate be of leasehold tenure, the lease under which the property is held by the vendor should be recited, and when the intermediate dealings with the property have been extensive, it will be sufficient after the recital of the lease to recite that by divers mesne assignments and other acts in the law, the property has become vested either in the vendor or in some former owner from whom it may be necessary under the circumstances to trace the title on the purchase deed, such as a mortgagor or testator.

Estoppel.—The recital of a particular fact may operate as an *estoppel*, but the statement must be distinct and

precise. A recital that the vendor is seised probably constitutes an estoppel, so that if he acquire the legal estate after the conveyance, it will pass to the purchaser by virtue of the estoppel. But a recital that the vendor is "seised or otherwise well and sufficiently entitled," is too ambiguous to create an estoppel (*r*). A grantor cannot be estopped from denying that he had the legal estate unless there is an express statement in the deed that he had it (*s*). An erroneous recital in a conveyance as to the derivation of the grantor's title does not estop the grantee from showing what interest has really passed to him (*t*).

In cases where the statutory forms, given by the Conveyancing and Law of Property Act, 1881, are strictly adhered to, recitals will be omitted; but it seems the practice of conveyancers, in most cases, to adopt the form of recital in use before the Act.

SECTION 5.

Testatum.

Following the recitals will come the testatum, containing the consideration and the operative words of conveyance or assignment to the grantee or assignee. If it is desired to imply covenants for title, the vendor must convey as beneficial owner, mortgagee, trustee, or settlor as the case may be (*u*).

(*r*) *Heath v. Crealock*, 10 Ch. 30;
General Finance, Mortgage and Discount Co. v. Liberator Permanent Building Society, 10 C. D. 15.

(*s*) *Onward Building Society v.*

Smithson, (1893) 1 Ch. 14.
(*t*) *Trinidad Asphalte Company v. Coryat*, (1896) A. C. 587.
(*u*) 44 & 45 Vict. c. 41, s. 7.

In this part of the deed the estate limited need not be defined, but the conveyance or assignment should be limited to the grantee or assignee by name.

Prior to the Conveyancing Act the operative words used for the conveyance of freehold property were "grant," or "grant and convey," and with reference to the word grant, although it was the proper term to be used in a deed of grant, its employment was not absolutely necessary, and other words indicating an intention to grant would have been effectual; but now as to deeds, whether executed before or since the Act (*v*), the use of the word grant is not necessary in order to convey hereditaments, corporeal or incorporeal.

The words "give" or "grant" in a deed executed after the 1st of October, 1845, will not imply any covenant at law in respect of any tenements or hereditaments, except so far as they may do so by force of any Act of Parliament (*w*).

Sect. 50 of the Conveyancing Act enacts that freehold land may be conveyed by a person to himself *jointly with another person* by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by *a husband to his wife*, and by *a wife to her husband*, alone or jointly with another person. With regard to copyholds, a husband may surrender his own estate to the use of his wife, or the wife to that of her husband, for the conveyance is through the intervention of the lord (*x*).

Consideration.—The Stamp Act of 1891 (*y*) enacts, that all facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad*

(*v*) 44 & 45 Vict. c. 41, s. 49.

(*x*) Watkins on Copyholds, p. 93.

(*w*) 8 & 9 Vict. c. 106, s. 4, and
see *supra*, p. 105.

(*y*) 54 & 55 Vict. c. 39, s. 5.

valorem duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument.

When timber or fixtures standing upon the estate are taken at a valuation, the amount thereof must be included in the consideration (*z*), but not the value of chattels which pass by delivery, unless they be assigned by deed, in which case *ad valorem* duty attaches (*a*); and the mere recital of the sale and delivery, unless the articles referred to come within the description of goods, wares and merchandise, will cause *ad valorem* duty to attach (*b*); but duty does not attach in respect of money paid by way of compensation for damage to adjacent property in the case of a conveyance under the Lands Clauses Consolidation Act, and such amount should not on that account be included in the consideration (*c*).

If copyholds are purchased with other property at one entire price, the consideration in respect of the copyholds should be apportioned, as the *ad valorem* duty in respect of the copyholds will be denoted on the surrender. If the interest of the vendor in the copyholds is equitable only, the deed will be charged with *ad valorem* duty in respect of the copyholds.

SECTION 6.

Parcels and General Words.

Parcels.—The parcels in most cases follow the description of the estate contained in the contract, and it is a very common and convenient practice to describe the parcels by reference to a plan and schedules.

(*z*) See C. A. 1881, s. 6.

17 L. J., Ex. 266.

(*a*) Dart, V. & P. 597.

(*c*) Dart, V. & P. 599.

(*b*) *Horsfall v. Hay*, 2 Exch. 778;

A plan, however, should only be used as an adjunct to the description contained in the body of the deed, and to rely exclusively on the plan for the identification of the property is very careless conveyancing (*d*).

In cases of sale under the Railway and Waterworks Clauses Acts, if it is the intention that the mines and minerals should pass by the conveyance, they must be specified, as otherwise they will not pass (*e*).

Highways.—The rule of construction is now well settled that where there is a conveyance of land, even although it is described by reference to a plan, and by colour and by quantity, if it is said to be bounded on one side, either by a public thoroughfare or a river, then on the true construction of the instrument half the bed of the river or half the road passes (*ad medium filum*) ; unless there is enough in the circumstances, or enough in the expressions of the instrument to show that this is not the intention of the parties (*f*). This is the rule laid down in the leading case of *Berridge v. Ward* (*g*). The presumption applies in the case of a street in a town (*h*), and also to a highway of limited dedication (*i*), but probably does not apply when there has been no dedication to the public at all.

As to what circumstances are sufficient to rebut this presumption, the reader is referred to the case of *Pryor v. Petre* (*j*).

(*d*) Dart, V. & P. 1093, 1094.

(*h*) *Re White's Charities*, (1898)

(*e*) 8 & 9 Vict. c. 20, s. 77 ; 10 &

1 Ch. 659.

11 Vict. c. 17, s. 18.

(*i*) *Smith v. Howden*, 14 C. B.,

(*f*) *Micklethwaite v. Newlay*

N. S. 398.

Bridge Co., 33 C. D. 145.

(*j*) 1894, 2 Ch. 11.

(*g*) 10 C. B., N. S. 400.

General Words.

Following the parcels it was formerly the practice to insert general words as to easements, appurtenances, etc. (*k*).

Very large general words are now implied by the Conveyancing Act in every conveyance unless a contrary intention is expressed therein.

Contrary Intention.—It would seem that the insertion of express general words is a sufficient indication of contrary intention, upon the principle *expressio unius exclusio alterius* (*l*). But it has been held that the mere fact that adjoining land is referred to as "building land" is insufficient to show a contrary intention (*m*).

It is certainly expedient for the vendor to insert an express proviso excluding the large general words implied by the Act, where, as not infrequently happens, these words would include rights and easements which he has not contracted to sell (*n*).

A careful conveyancer should always consider this point when the purchaser's draft is submitted to him for approval on behalf of the vendor (*o*).

Evidence will not be received after the execution of the conveyance to show that property, which would *prima facie* pass under the general words, was not intended to be included in the purchase (*p*).

(*k*) C. A. 1881, s. 6, sub-s. 4.

(*l*) *Birmingham, Dudley and District Banking Co. v. Ross*, 38 C. D. at p. 308.

(*m*) *Broomfield v. Williams*, (1897) 1 Ch. 602.

(*n*) *Re Peck and School Board for*

London, (1893) 2 Ch. 315; *Re Hughes and Ashley*, (1900) 2 Ch. 595.

(*o*) *Bolton v. Bolton*, 11 C. D. at p. 969.

(*p*) *Doe d. Webster v. Norton*, 4 P. & D. 270.

For the convenience of the reader, the first three subsections of sect. 6 are given *in extenso*.

“(1.) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey with the land all buildings, erections, fixtures (*q*) commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance *demised, occupied, or enjoyed* with (*r*), or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

“(2.) A conveyance of land, *having houses or other buildings thereon*, shall be deemed to include and shall by this act operate to convey with the land, houses, or other buildings, all out-houses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed or any part of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

“(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, multures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rents charge, rents seck, rents of assize, fee-farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or en-

(*q*) Cf. *In re Brooke*, (1894) 2 Ch. 600; *Small v. National Provincial Bank*, (1894) 1 Ch. 686,

(*r*) As to what passes under these words, see *Kay v. Oxley*, L. R. 10 Q. B. 360.

joyed with the same, or reputed or known as part, parcel, or member thereof."

All Estate Clause.

The "all estate" clause which formerly followed the "general words" is now rendered unnecessary by the 63rd section of the Conveyancing Act, 1881, which enacts with regard to conveyances made after the 31st December, 1881, that every conveyance shall "be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same."

"This section applies only if and as far a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained" (*rr*).

SECTION 7.

Reservations and Habendum.

Reservations.—After the parcels the vendor should insert such reservations (if any) as by the terms of the contract he is entitled to make (*s*). The general rule is that a man cannot derogate from his own grant, and consequently if the grantor intends to reserve any right over the tenement granted, such, for instance, as a right of way, an easement of light, or other easement, it is his duty to reserve it expressly in the grant (*t*). The reservation of

(*rr*) See *Williams v. Pinckney*, 66 L. J. Ch. 551.

(*s*) Strictly speaking an easement cannot be reserved, but operates as

a new grant by the grantee to the grantor, see *Goddard on Easements*, p. 146.

(*t*) *Wheeldon v. Burrows*, 12 C.D. 31.

an easement is never *implied* except in the case of an easement of necessity. If a landowner sells the surface reserving to himself the minerals with power to get them, this will not entitle him to get the minerals in such a way as to destroy the surface, unless the reservation is framed in such a way as to show clearly that he is entitled to have that power (*u*).

The Habendum.

The habendum determines and ascertains the estate or interest limited by the deed, though this, as we have before seen, is frequently done by the grant in the premises, in which case the habendum may lessen, enlarge, explain or qualify, but not contradict or be repugnant to, the estate granted in the testatum (*v*). And it is now provided by the Conveyancing and Law of Property Act, 1881, sect. 51, that in a deed executed after the Act it shall be sufficient in the limitation of an estate in fee simple to use the words in fee simple without the word heirs, and on the limitation of an estate tail to use the words in tail without the words heirs of the body, and on the limitation of an estate in tail male or in tail female, to use the words in tail male or in tail female, as the case requires, without the words heirs male of the body or heirs female of the body. If the conditions stipulate that the property is sold and *will be conveyed*, subject to all existing easements, the vendor is entitled to have a saving clause in general terms inserted in the habendum (*w*). If the contract states that the property is sold subject to certain restrictive covenants, the purchaser is entitled to

(*u*) *Hext v. Gill*, 7 Ch. 699.

(*v*) *Gibbs*, 5 B. & C. 709.

(*v*) *Shep. Touch.* 76; *Goodtitle*

(*w*) *Gale v. Squier*, 5 C. D. 625.

a conveyance subject only to the restrictive covenants mentioned in the contract, although he has notice of others (*x*). His liability, however, under the covenants depends, as we shall see, not in their inclusion in the conveyance but on his notice of their existence.

SECTION 8.

Covenants for Title.

After the habendum follow the covenants for title, if it is desired to insert any express covenants. It is usual since the Conveyancing Act, 1881, to rely upon the covenants for title implied by that Act (*y*).

No covenant is implied by the Act unless the vendor is expressed to convey as *beneficial owner*, or as *settlor*, or as *trustee*, or as *mortgagee*, or as *personal representative* of a deceased person, or as *committee* of a lunatic so found by inquisition, or *under an order of the Court*, or by the direction of a person as *beneficial owner* (*z*).

The effect of a conveyance as *beneficial owner* in the case of a sale is provided for by clauses (a) and (b) of sect. 7, sub-sect. 1, and in the case of a mortgage by clauses (c) and (d). The effect of conveying as *settlor* is provided for by clause (e) of the same sub-section, and clause (f) deals with the remaining cases of conveyances by trustees, mortgagees, &c. Where a conveyance is made by the direction of some person who is expressed to direct as *beneficial owner*, as in the case of a conveyance by

(*x*) *Re Wallis and Bernard*, (1899) 2 Ch. 515. (*z*) 44 & 45 Vict. c. 41, s. 7, sub-s. 4.

(*y*) 44 & 45 Vict. c. 41, s. 7.

trustees by the direction of the tenant for life, the person giving the direction is deemed to convey as beneficial owner (*a*).

It must be borne in mind that the covenants implied by the Act may be varied or extended by the deed (*b*), and it is desirable to introduce a modification in the case of a sale by a tenant for life, or by joint owners, or tenants in common.

In the case of a tenant for life, a proviso is usually inserted that as respects the reversion or remainder expectant on the life estate, the covenants for title shall not extend to the acts, deeds or defaults of persons other than the tenant for life and his heirs and persons claiming under or in trust for him (*c*). It has, however, been doubted by Cozens-Hardy, J., whether this restriction has any force whatever in the case of a sale by a tenant for life under the Settled Land Acts (*d*).

In the absence of special agreement the purchaser is entitled to a joint and several covenant as to the entirety by tenants in common. In the case of a conveyance by a husband and wife, as, for instance, under the Fines and Recoveries Act, it is provided (*e*) that "where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section (seven), the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner; and in addition to the covenant implied on the part of the

(*a*) 44 & 45 Vict. c. 41, sub-s. 2.

(*d*) *Re Tyrell*, June 1900 (un-

(*b*) *Ib.* sub-s. 7.

reported).

(*c*) See Dart, p. 620,

(*e*) *Ib.* sub-s. 3,

wife, there shall be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife."

If the vendor does not intend that his covenants for title shall extend to defects disclosed to the purchaser, *whether on the face of the deed or aliunde*, the vendor must take care either to frame his covenant so as in terms to cover such defects, or he must insert some clause in the deed clearly explaining and controlling his covenants (*f*).

The generality of the covenant for title cannot be restricted by proving that a defect was known to the purchaser, *e.g.* by showing that the purchaser knew that the plan to the conveyance was continued beyond the true boundary of the property (*g*).

The benefit of the covenants implied by sect. 7 of the Conveyancing Act *run with the land* (*h*), and an action on these covenants can be brought in respect of privity of estate, as distinguished from privity of contract (*i*), but there must be a *legal estate* with which the covenant can run (*j*).

A covenant for title is a continuing covenant, and a right or action accrues *toties quoties* when and as often as damage actually arises from the breach. It would therefore seem that the Statute of Limitations (3 & 4 Will. IV. c. 42) cannot be successfully pleaded (*jj*).

(*f*) *Page v. Midland Rail. Co.*, (1894) 1 Ch. 20.

(*g*) *May v. Platt*, (1900) 1 Ch. 621.

(*h*) *David v. Sabin*, (1893) 1 Ch. 523.

(*i*) 44 & 45 Vict. c. 41, s. 7, sub-s. 6. This simply declares

what was already the law: see Dart, V. & P. 876.

(*j*) *Onward Building Society, v. Smithson*, (1893) 1 Ch. at p. 12.

(*jj*) *Shep. Touchstone, 170. Spoor v. Green*, L. R. 9 Ex. at p. 117, but see *contra* judgment of Baron Bramwell at p 111.

Beneficial Owner.—In the case of a sale of freehold property by a vendor who conveys as beneficial owner, there are four covenants implied, viz., right to convey, quiet enjoyment, freedom from incumbrances, and further assurance. The covenants are all qualified, and only apply to (1) the acts and omissions of the vendor himself; (2) the acts and omissions of persons through whom he claims otherwise than by purchase for value; (3) the acts and omissions of persons claiming through him; and (4) the acts and omissions of persons claiming in trust for him (*k*).

In the case of a sale of leaseholds, in addition to the four covenants which have just been enumerated, there is a covenant implied that the lease is valid and subsisting, but this is qualified like the others.

Settlor.—A conveyance as settlor only implies a covenant for further assurance which is limited to the person so conveying and persons deriving title under him. A covenant for further assurance imports relief from incumbrances in the case of a conveyance for value, but this is not the case when the conveyance is voluntary (*l*).

Trustee, Mortgagee, Personal Representative, &c.—Where the conveyance is expressed to be made by the vendor as trustee, mortgagee, personal representative, committee of a lunatic so found by inquisition, or under an order of the Court, the only covenant implied is against incumbrances, and this is limited to the acts or omissions of the vendor, and to acts or omissions to which the vendor has been “party or privy.”

(*k*) *David v. Sabin*, (1893) 1 Ch. at p. 582. *Forrester*, (1893) 2 Ch. 461, and cases there cited.

(*l*) *In re Jones, Farrington v.*

In construing the words "party or privy" in another Act, Lindley, L. J., said (*m*): "One person may be and often is liable in law for frauds which he has not committed; but to say that he is *party* or *privy* to them is quite another matter, and is only true when he has personally in some way participated in them."

For the convenience of the reader, sub-sect. 1 of sect. 7 is given *in extenso*.

"7.—(1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

"(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to Convey.—That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed.

Quiet Enjoyment.—And that notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the

(*m*) *Thorne v. Heard*, (1894) 1 Ch, at p. 606,

benefit thereof, shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value. This covenant refers to interference with *title* or *possession* and not to mere temporary inconvenience caused by the acts of the covenantor (*n*). If there is an easement over the property, the grantor can be sued under this covenant (*o*).

Freedom from Incumbrances.—And that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified (*p*) against, all such estates, *incumbrances* (*q*), claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value.

Further Assurance.—And further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so

(*n*) *Manchester, Sheffield and Lincolnshire Rail. Co. v. Anderson*, (1898) 2 Ch. 394.

(*o*) *Sutton v. Baillie*, 65 L. T. 528.

(*p*) It is presumed that the covenantor could be brought in as a third party under Order 16, r. 48.

(*q*) In *Phillips v. Caldbleugh*, L. R. 4, Q. B. 159, a restrictive covenant was treated as an "incumbrance," but in *Cato v. Thompson*, 9 Q. B. D. 618, Jessel, M. R. said: "This is often called an incumbrance, but not with propriety."

conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(B.) **In a conveyance of leasehold property for valuable consideration, other than a mortgage,** the following further covenant by a person who conveys and is expressed to convey as **beneficial owner** (namely):

That, notwithstanding anything by the person who so conveys or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(C.) **In a conveyance by way of mortgage,** the following covenant by a person who conveys and is expressed to convey as **beneficial owner** (namely):

That the person who so conveys, has, with the concurrence of

every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by that conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(D.) **In a conveyance by way of mortgage of leasehold property**, the following further covenant by a person who conveys and is expressed to convey as **beneficial owner** (namely) :

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance ; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them :

(E) **In a conveyance by way of settlement**, the following covenant by a person who conveys and is expressed to convey as **settlor** (namely) :

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made

and those deriving title under them, subject as, if so expressed and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required :

(F.) **In any conveyance**, the following covenant by every person who conveys and is expressed to convey as **trustee** or **mortgagee**, or as **personal representative** of a deceased person, or as **committee** of a lunatic so found by inquisition or **under an order of the Court**, which covenant shall be deemed to extend to every such person's own acts only (namely) :

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."

SECTION 9.

Covenants other than Covenants for Title.

After the habendum in a modern conveyance follows the covenants (if any) which are to be entered into by the vendor or purchaser. It is proposed first to consider the burden of these covenants, and secondly, the benefit.

The Burden of Covenants.

For the purposes of discussing the burden of covenants it is necessary to divide covenants into two classes, viz., affirmative and negative.

I.—The burden of an *affirmative* covenant, *i.e.*, a covenant compelling a man to lay out money or do any other act of

an active character, does not run with the land at common law, except as between landlord and tenant, and is not enforced by Courts of Equity, as against an assignee.

The principle appears to be that an affirmative covenant is either personal to the covenantor, or, if it gives an interest in land, is obnoxious to the rule against perpetuities. Consequently the purchaser of land with notice of an affirmative covenant entered into by the vendor is not bound thereby (*r*).

It must, however, be remembered that a covenant although affirmative in form may be negative in substance (*s*), and where it is partly affirmative and partly negative, the Court will, in a proper case, enforce the negative part of the covenant (*t*).

II.—A *negative*, or, as it is usually called, a *restrictive*, covenant probably did not run with the land at common law as between owners in fee simple. The Courts of Equity, however, restrained any one who took property *with notice* of a restrictive covenant from using it in a way inconsistent with the covenant (*u*). Since the Judicature Act the rules of equity prevail, and consequently any assign of the covenantor who takes with notice, either actual or constructive, of a restrictive covenant, is bound thereby, unless it is clear that the covenant was intended to be personal to the covenantor (*v*).

With regard to covenants made after the 31st December,

(*r*) *Haywood v. Brunswick Building Society*, 8 Q. B. D. 403; *London & South Western Rail. Co. v. Gomm*. 20 C. D. 562; *Austerberry v. Corporation of Oldham*, 29 C. D. 750.

Q. B. D. 409); *Catt v. Tourle*, 4 Ch. 654.

(*t*) *Clegg v. Hands*, 44 C. D. 503.

(*u*) *Tulk v. Moxhay*, *supra*.

(*v*) *Fawcett and Holmes*, 42 C. D. 150.

(*s*) *Tulk v. Moxhay*, 2 Ph. 774
(as explained by Cotton, L. J., 8

1881, if a contrary intention is not expressed, the covenant, though not expressed to bind heirs, "shall operate in law to bind the heirs and real estate" (*w*). But if it is intended that the burden shall run with the land, the *assigns* of the covenantor should be mentioned, and also the land to be burdened (*x*).

Certain public bodies, such as a School Board purchasing for the purposes of the Elementary Education Act, 1870, are not bound by restrictive covenants, even although they buy with notice of them (*y*).

A restrictive covenant is not obnoxious to the rule against perpetuities, since it is not a limitation of property (*z*).

The Benefit of Covenants.

The benefit of a covenant runs with the land where the covenant is one which relates to or touches and concerns the land of the covenantee, and there is nothing in the nature of the transaction to show that this was not the intention of the parties (*a*). A covenant which fulfils these conditions may be enforced by persons having privity of estate with the original covenantee (*b*). By sect. 58 of the Conveyancing Act, 1881, it is enacted, with regard to covenants made after the 31st December, 1881, that "A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and

(*w*) Conveyancing Act, 1881, s. 59. G. 1; *Mackenzie v. Childers*, 4 C. D. 265.

(*x*) *Wolstenholme*, p. 114.

(*y*) *Kirby v. School Board for Harrogate*, (1896) 1 Ch. 437.

(*z*) *Coles v. Sims*, 5 De G. M. &

G. 1; *Spencer's Case*, 5 Co. 15;

Austerberry v. Corporation of Oldham, 29 C. D. 776.

(*b*) *Dart, V. & P.* 877.

assigns, and shall have effect as if heirs and assigns were expressed." Independently, however, of this enactment, it is not necessary that assigns should be expressly mentioned in the covenant in order that it should extend to the assigns of the covenantee (*c*).

Assignment of Benefit.—It does not follow that every person having the same estate as the covenantee can enforce the covenant. Thus, in general, the purchaser of a portion only of the covenantee's property cannot enforce the covenant where the rights under the covenant have not been expressly assigned (*d*). The assignment need not, however, be express, but may be collected from the transaction of sale and purchase.

Thus, in the case of the sale of building land in lots, where each purchaser enters into restrictive covenants with the vendor, the several purchasers may enforce the covenants against one another, and the right enures to the assigns of the first purchasers (*e*). This right does not arise where it is clear that the covenants were intended exclusively for the benefit of the vendor (*f*). But when the benefit of a restrictive covenant has been once *clearly annexed* to one piece of land, there is a presumption that it passes by an assignment of that land, and it may be said to run with the land, in equity as well as at law, without proof of special bargain or representation on the assignment of the land (*g*).

(*c*) *Dart, V. & P.* 878.

82 L. T. 594.

(*d*) *Renals v. Cowlishaw*, 9 C. D. 125; 11 C. D. 866; *Everett v. Remington*, (1892) 3 Ch. 148.

(*f*) *Keats v. Lyon*, 4 Ch. 218; *Collins v. Castle*, 36 C. D. 243.

(*e*) *Renals v. Cowlishaw*, 9 C. D. at p. 129; and see *Naldu v. Harman*,

(*g*) *Rogers v. Hosegood*, (1900) 2 Ch. 388.

How Lost.—The right to enforce a covenant of this kind may be lost by delay and acquiescence (*h*). It is a mistake, however, to suppose, as was stated in previous editions of this book, that if a restrictive covenant is not enforced in all cases, it cannot be enforced in any. If the character of the land has been so substantially changed that the objects of the covenants can no longer be attained, the Court will refuse to enforce them (*i*). But the fact that in a few instances the covenants have been relaxed does not destroy the benefit of the covenants as to the rest of the estate (*j*).

SECTION 10.

Assurances of Copyholds.

When the estate sold is of copyhold tenure, if the vendor is beneficially interested, the surrender to the purchaser is usually accompanied by a deed implying the ordinary covenants for title.

If the vendor is a trustee for sale under a will containing an authority to sell merely without a devise to him, the trustee can appoint to the purchaser, and a double admittance with the consequent fines be thus avoided (*k*) ; but if there is a devise to trustees, the lord can require them to be admitted, and they cannot avoid the fees consequent thereon by calling upon the lord to admit an

(*h*) *Sayers v. Collyer*, 28 C. D. 103 ; *Roper v. Williams*, 2 T. & R. 18 ; *Hepworth v. Pickles*, (1900) 1 Ch. 108.

(*i*) *Duke of Bedford v. Trustees of British Museum*, 2 My & K. 552 ; *Peck v. Matthews*, L. R., 3 Eq. 515.

(*j*) *German v. Chapman*, 7 C. D. 271 ; *Knight v. Simmonds*, (1896) 2 Ch. 294.

(*k*) *Glass v. Richardson*, 2 De G., M. & G. 658 ; *Reg. v. Wilson*, 9 Jur., N. S. 439.

infant heir (*l*), though he cannot in such a case seize *quousque* for want of a tenant, and the estate will remain in the customary heir until the devisee is admitted (*m*).

The surrender may be made either in or out of Court. If made in Court it is entered on the Court rolls of the manor, and a copy of the entry, signed by the steward, and stamped, is delivered to the purchaser. If the surrender is made out of Court, the document evidencing the surrender is signed by the parties and the steward, and stamped, and entered upon the Court rolls (*n*). An *equitable* interest in copyholds is not the subject of a surrender except for the purpose of barring an estate tail. Equitable interests are usually conveyed by deed of assignment (*o*).

The legal assurances are usually prepared by the steward of the manor.

Until admittance the surrendor remains tenant to the lord, and the person to whose use the surrender is made acquires merely a right to be admitted (*p*), which right may be exercised at any time, though it is usually done immediately; but whenever the admittance is taken it will relate back to the surrender (*q*), and on such admittance the surrenderee becomes tenant to the lord, to whom he must pay the customary fine for his admittance; but a covenant to surrender will not give the lord a right to a fine.

The equitable interest of the covenantee will pass by

- (*l*) *The Queen v. Garland*, L. R., 5 Q. B. 269.
- (*m*) *Garland v. Mead*, L. R., 6 Q. B. 441.
- (*n*) Copyhold Act, 1894 (57 & 58 Vict. c. 46), s. 85.
- (*o*) *Scryven on Copyholds*, p. 116;
- Elton on Copyholds, p. 93.
- (*p*) *Doe d. Tofield v. Tofield*, 11 East, 246; *Doe d. Winder v. Lawes*, 7 Ad. & E. 195; *Rex v. Dame Jane St. John Mildmay*, 5 B. & Ad. 254.
- (*q*) 1 Watk. Cop. 103.

assignment, and the lord is bound to admit the assignee on payment of one fine (*r*), but it cannot be surrendered except for the purpose of barring an entail.

The fine paid to the lord is either certain or arbitrary ; but if arbitrary is restrained to two years' improved value of the land, after deducting quit rents (*s*).

The admittance of one joint tenant or one coparcener is the admission of their companions, and one fine only on their admission is therefore payable (*t*), and in the absence of special custom the steward is entitled to one fee only (*u*). Tenants in common must, however, be admitted severally, and pay a fine in respect of the share to which they are admitted, and on their death, as also on the death of a coparcener, the representatives must be admitted and pay several fines in respect of their admissions (*v*).

Where copyholds are limited in remainder subject to any particular estate, the admission of the tenant of the particular estate is the admission of those in remainder, and one fine only is payable, which fine should be apportioned between the tenant of the particular estate and the remaindermen, and should be paid by the latter on his coming into possession (*w*) ; but if a special custom exists by which a fine is payable by the remainderman on coming into possession, he should be admitted (*x*).

On an estate falling into the possession of a reversioner he may enter without re-admission or payment of a fine,

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| (<i>r</i>) <i>The King v. The Lord of the
Manor of Hendon</i> , 2 T. R. 484. | & Bl. 913. |
| (<i>s</i>) 1 Watk. Cop. 308. | (<i>v</i>) 1 Watk. Cop. 82. |
| (<i>t</i>) Scriv. Cop. 347. | (<i>w</i>) Scriv. Cop. 294. |
| (<i>u</i>) <i>Traherne v. Gardiner</i> , 5 El. | (<i>x</i>) <i>Doe d. Whilbread v. Jenning</i> ,
8 East, 522 ; 1 Watk. Cop. 36. |

but the heir of the reversioner must be admitted and pay a fine, and the same rule applies in the case of the heir of a remainderman, and such heir may surrender before admittance (*y*), though a surrender by a surrenderee before his admittance is void (*z*).

Neither the Statute *De Donis* (*a*) nor the Statute of Uses (*b*) extend to copyhold estates, and the lord of a manor is not bound to receive a surrender of copyholds by a deed burdened with trusts or to such trusts as the surrenderee shall appoint, and in default of appointment to the use of the surrenderee, his heirs and assigns (*c*).

SECTION 11.

Assurances of Registered Land.

If the property sold is already on the register, *i.e.*, if the title thereto has been registered under the Land Transfer Acts, the conveyance must be effected by a transfer in the forms provided in the First Schedule to the Land Transfer Rules, 1898 (*d*).

Instruments for which no form is provided, or to which the scheduled forms cannot conveniently be adopted, shall be in such form as the Registrar shall direct, the scheduled forms being followed as nearly as circumstances will permit. There may be added to the form as a separate part thereof or in a schedule thereto any special stipulations varying or adding to the provisions thereof that the parties may wish to enter into; but the registrar

(*y*) *The Queen v. The Lady of the Manor of Dallingham*, 8 Ad. & El. 885; *Evelyn v. Worsfold*, 15 L. T. 4.

(*z*) 1 Watk. Cop. 81.

(*a*) 13 Edw. I., c. 1.
 (*b*) 27 Hen. VIII., c. 19.
 (*c*) *Flack v. Downing College*, 19 C. B. 945.
 (*d*) See Rules 79 & 80.

is not to allow any such stipulation to be entered or noted in the register unless application is made to him in writing to do so, and he considers that such entry or note can be properly inserted (e).

For the purpose of introducing the implied covenants under the Conveyancing Act, 1881, a person may in a registered disposition be expressed to execute, transfer, or charge as beneficial owner, settlor, etc.; and an instrument of transfer or charge may be worded accordingly, but no reference to such implied covenants shall be entered in the register (*f*). When the title registered is possessory only, as is usually the case, the purchaser should insist on the introduction of implied covenants for title.

The Forms provided by Land Transfer Rules, are as follows:—

**Form 14.—Instrument of Transfer of the Whole of the Land
comprised in a Title.**

Land Registry.

(*Land Transfer Acts, 1875 and 1897.*)

District

Parish

No. of Title

(Date)

In consideration of pounds (£),
I, A. B., of, etc., hereby transfer to C. D., of, etc., the
land comprised in the title above referred to.

Signed, sealed, and delivered by

the said A. B., in the presence of E. F., of, etc.

Signature of A. B.

Seal.

(e) Rule 147.

(f) Rule 148.

When the consideration is advanced by different persons in separate sums, or does not consist or wholly consist of money, its nature or the separate payments made may be concisely stated. When the transfer is to two or more jointly, no addition need be made to the form. When it is to two or more as tenants in common, one of the following forms may be used:—"to C. D. and E. F. in equal shares;" "to C. D. four-fifths, and to E. F. one-fifth of," and so on. Where the transferor retains a share, add the words, "and I, the said A. B., retain share, or shares."

The amount of the consideration should be stated in words, and repeated in figures, as, for instance "three hundred and seventy pounds (£370)."

Form 15.—Instrument of Transfer of Part of the Land comprised in a Title.

As form 14, adding after "the land" these words: "shown and edged with red on the accompanying plan (and if it is desired that a particular verbal description be entered on the register, described in the schedule hereto), being part of the land comprised in the title above referred to."

Add schedule, if any.

The plan must be signed by the transferor, and by or on behalf of the transferee.

CHAPTER XVIII.

SEARCHES FOR INCUMBRANCES.

SECTION 1.

Local Searches.

IF any part of the property is situated in Middlesex or in Yorkshire, search should be made in the registries established for those counties.

Under the Middlesex Registries Acts, 1708 and 1891 (*a*), unregistered conveyances (*b*) and wills are void against subsequent purchasers for value claiming under a registered deed (*c*). Wills registered *within six months* after the death of a testator who died in Great Britain, or registered *within three years* after the death of a testator dying elsewhere, have the same effect as if they were registered at the time of the testator's death (*d*). Where there is some unavoidable impediment to registration, and a memorial of the impediment has been entered within two years of the death of a testator dying in Great Britain, or within four years of the death of a testator dying elsewhere, then registration of the will is sufficient if made within six

(*a*) 7 Anne, c. 20; 54 & 55 Vict. c. 64. carries from one person to another an interest in land. See *Credland v. Potter*, 10 Ch. 8.

(*b*) There is no magical meaning in the word "conveyance." It denotes any instrument which

(*c*) 7 Anne, c. 20, s. 1.

(*d*) *Ib.* s. 8.

months after probate of the will or the removal of the impediment (*e*). After the lapse of five years from the testator's death, a registration will not be effectual against purchasers (*f*); but an unregistered document is binding upon a purchaser who buys with actual notice of the document (*g*). A purchaser is not, however, bound to inquire about documents which are not registered and of which he has no notice (*h*).

Under the Yorkshire Registries Act, 1884 (*i*), provisions are made for the registration of assurances, wills, and other instruments. The Amending Act of 1885 (*j*) provides for the registration of a caveat in favour of a purchaser (*k*), which gives the purchaser the same priority as he would get from the registration of the assurance to him.

Neither the Middlesex nor the Yorkshire Acts apply to copyholds, or to leases for not more than twenty-one years where possession goes with the lease (*l*); and the Middlesex Registry Act does not apply to leases at a rack rent.

Letters of administration and wills of leaseholds are never registered, and with regard to the wills of testators dying since the 1st January, 1898, it is difficult to see any advantage to be derived from registration even in the case of freeholds.

An agreement for the sale of land cannot be registered (*m*).

No registration is required of a foreclosure decree (*n*),

(*e*) 7 Anne, c. 20, s. 9.

(*k*) *Ib.* s. 3.

(*f*) *Ib.* s. 10.

(*l*) 7 Anne, c. 20, s. 17; 47 & 48

(*g*) *Rolland v. Hart*, 6 Ch. 678;

Vict. c. 54, s. 28.

Re Weir, 58 L. T. 792.

(*m*) *Rodger v. Harrison*, (1893)

(*h*) *Kettlewell v. Watson*, 26 C.

1 Q. B. 161.

D. 501.

(*n*) *Burrows v. Holley*, 35 C. D.

(*i*) 47 & 48 Vict. c. 54.

123.

(*j*) 48 & 49 Vict. c. 26,

or of an adjudication in bankruptcy (*o*), but it would seem that the certificate appointing a trustee (under sect. 54, sub-sect. 4 of the Bankruptcy Act, 1883), should be registered.

The Middlesex Registry Act does not apply to any instrument made after the 30th July, 1900, and capable of Registration under the Land Charges Act, 1888 (*oo*).

The Vendor and Purchaser Act, 1874 (*p*), provides that an assurance to a purchaser or mortgagee by a devisee claiming under a will not registered in Yorkshire or Middlesex, or by some one deriving title under such devisee, shall, if registered before, prevail over any assurance from the testator's heir-at-law. When the property sold is situated in either Yorkshire or Middlesex, searches should be made against every person who is shown by the abstract to have been owner of the property, or to have had power to dispose of it; but in practice the searches are usually confined to the period which has elapsed since the last preceding sale or mortgage. Under the Yorkshire Registries Act, 1884, an *Official Search* can be obtained which protects solicitors, trustees, or other persons in a fiduciary position, but is not conclusive in favour of the purchaser (*q*).

SECTION 2.

Judgments.

Under 1 & 2 Vict. c. 110 (sect. 19), judgments entered up against the owner of land do not affect a purchaser of the land unless registered in the Common Pleas Office. Under

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| <p>(<i>o</i>) <i>Re Calcott and Elvin</i>, (1898) 2 Ch. 460.</p> <p>(<i>oo</i>) 53 & 54 Vict. c. 26, s. 4.</p> | <p>(<i>p</i>) 37 & 38 Vict. c. 78, s. 8.</p> <p>(<i>q</i>) 47 & 48 Vict. c. 54, ss. 20, 21 and 28.</p> |
|--|--|

2 & 3 Vict. c. 11 (sect. 14), such a registration must be repeated every five years ; and under 23 & 24 Vict. c. 38, which came into force on the 23rd July, 1860 (sect. 1), the judgment does not affect a purchaser unless a *writ of execution* has been *issued* and registered, and executed within three months of registration. Under 27 & 28 Vict. c. 112 (sect. 1), judgments entered up since the 29th of July, 1864, do not affect land until the land has been *delivered in execution* (*r*). Under the Land Charges Registration and Searches Act, 1888 (*s*), writs and orders affecting land are void as against a purchaser unless *registered at the land registry*.

By the Land Charges Act, 1900 (63 & 64 Vict. c. 26), the Land Charges Act, 1888, is extended so as to include all judgments, writs, and orders, whether at the suit of the Crown or of a subject, but this Act does not come into operation until 1st July, 1901.

Where, however, the last purchaser was not in a position to have a judgment entered up against him on or before the 23rd of July, 1860, a search at the *Land Registry* for writs and orders affecting land will be sufficient. An *Official Search* can also be obtained in this case (*t*). Writs registered under 27 & 28 Vict. c. 112, before the 1st January, 1889, if not registered under the Act of 1888, only retained their validity until the expiry of the three months for which their registration held good (*u*). Consequently, searches in the Central Office for executions *at the suit of a subject* have been unnecessary since the 31st March, 1889.

(*r*) *Re Pope*, 17 Q. B. D. 743.

(*s*) 51 & 52 Vict. c. 51, s. 6.

(*t*) 51 & 52 Vict. c. 51, s. 17.

(*u*) *Ib.* s. 6 (a).

SECTION 3.

Crown Debts.

Crown debts, incurred before the 4th June, 1839, can only be discovered by search at the Exchequer Office and among the Receiver-General's bonds at the Tax Office. The effect of 2 & 3 Vict. c. 11 (sect. 8), and 22 & 23 Vict. c. 35 (sect. 2), is to make Crown debts incurred since the 4th of June, 1839, void as against purchasers unless registered in the Central Office, and re-registered every five years. By 28 & 29 Vict. c. 104 (sect. 48), Crown debts incurred since the 1st of November, 1865, are void as against purchasers unless execution has been issued and registered.

Practically speaking, Crown debts incurred prior to 1839 can be disregarded.

Crown debts incurred after the 1st of November, 1865, will be discovered by a search in the Office of Land Registry to which the business of the register of judgments has been transferred from the Central Office. After 1st July, 1901, writs of execution at the suit of the Crown, of whatever date, will require to be registered under the Land Charges Act, 1888.

On a purchase of *copyholds*, no searches need be made with reference to Crown debts.

SECTION 4.

Annuities.

The Act requiring the enrolment of grants of life annuities was repealed in 1854; but an Act passed in the following year (*w*), provides that life annuities or rent-charges created after the 26th of April, 1855 (otherwise than by marriage settlement or will), shall not affect purchasers without notice (*x*) unless registered in the Land Registry Office.

Search should be made against the last purchaser and persons claiming under him from the commencement of the register or from the date at which the persons searched against acquired the property or attained twenty-one, whichever last happened. An *Official Search* can be obtained.

SECTION 5.

Lis Pendens.

In the absence of express notice, a purchaser is not bound by a *lis pendens*, unless it is registered and re-registered every five years (*y*). Search, therefore, should be made in the Office of Land Registry against the last purchaser, and persons claiming under him, for five years. An *Official Search* can be obtained.

(*w*) 18 & 19 Vict. c. 15, s. 12. 563.

(*x*) *Grevens v. Tofield*, 14 C. D. (*y*) 2 & 3 Vict. c. 11, s. 7.

SECTION 6.

Bankruptcy.

A search for bankruptcies must be made in the registers at the Bankruptcy Court, and should be for a period of twelve years prior to the date of completion. The necessity for this search must, to some extent, depend upon the position of the vendor; but it is often advisable, when the last purchase took place at a recent date, to make bankruptcy searches against all persons who have been owners during the last twelve years (*z*). No *Official Search* can be obtained.

SECTION 7.

Deeds of Arrangement and Land Charges.

The Land Charges Act, 1888 (*a*), requires the registration of deeds of arrangement and land charges as well as writs and orders affecting land. Deeds of arrangement and land charges do not require re-registration, and it is therefore necessary to carry back the search to the time when the persons searched against became entitled. An *Official Search* can be obtained.

A deed of arrangement for the benefit of creditors *generally* must also be registered within seven clear days after execution in the Bills of Sale department of the Central Office under the Deeds of Arrangement Act, 1887 (*b*). But a deed of arrangement for the benefit

(*z*) Cf. *supra*, Chap. V. s. 6.

(*b*) 50 & 51 Vict. c. 57, and cf.

(*a*) 51 & 52 Vict. c. 51, ss. 7-11. *Hedges v. Preston*, 80 L. T. 847.

of particular creditors (*c*), or intended primarily for the benefit of the debtor and his family (*d*), does not require registration at the Central Office.

SECTION 8.

Searches to be made.

Unless the vendor is selling as *trustee or mortgagee*, the following searches should generally be made :—

- I. An official certificate should be obtained of search in the Land Registry Office against the vendor for *lis pendens* for five years; and where the circumstances noted above render it advisable, for executions at the suit of the Crown, annuities, rent charges, and Crown debts for five years.
- II. An official certificate should be obtained of search at the Land Registry Office for writs and orders affecting land for five years, and for deeds of arrangement and land charges.
- III. Search should be made at the Bankruptcy Court for bankruptcies for twelve years.

If the vendor is a trustee or mortgagee, a search for *lis pendens* for five years is generally sufficient; but where trustees for sale are selling with the consent of the tenant for life, the same searches should be made against the latter as if he were owner in fee.

If the vendor is tenant in tail, it may be advisable to

(c) *Sanson and Schreiber's Contract, 39 Sol., J., 504.*

(d) *Re Hobbins, 6 Manson, 212.*

search in the Central Office for enrolled deeds from the time when the tenant in tail attained twenty-one.

If the property is situated in Middlesex or Yorkshire, the local registers should be searched, except in the case of copyholds.

If the vendor is a company, the purchaser should, if possible, search the register of mortgages which is kept by the company under sect. 43 of the Companies Act, 1862. After the 1st January, 1901, it will also be desirable to search the register to be kept by the Registrar of Joint Stock Companies (*e*).

If the property is copyhold, the Court rolls must be searched.

If the property sold has been registered under the Land Transfer Acts, no searches need be made in any other place than the Land Registry *since* the time of Registration. But if, as is usually the case, only a possessory title has been registered, the usual searches should be made up to the time of registration.

It is, moreover, a proper precaution to search the index-map of registered land to see whether the land sold has been registered.

In appropriate cases inquiry should be made of the local authority as to the existence of charges for paving and sewerage expenses.

(*e*) 63 & 64 Vict. c. 48, s. 14.

CHAPTER XIX.

EXECUTION OF ASSURANCE AND PAYMENT
OF PURCHASE-MONEY.

SECTION 1.

**Duty of the Purchaser to see to the Application of his
Purchase-Money.**

Trustees.—When real estate was sold by trustees, it was formerly the duty of the purchaser to see that the purchase-money was duly applied for the benefit of the beneficiaries, unless the trust directed the land to be sold for the payment of *debts generally*, or in express terms conferred upon the trustees the power of giving receipts (*a*).

Now, however, by sect. 20 of the Trustee Act, 1893 (*b*), which re-enacts a similar provision in the Conveyancing Act, 1881 (*c*), it is provided that the receipt in writing of any *trustee* (which expression includes a *constructive trustee* or *legal personal representative*) (*d*) “for any money, securities, or other personal property or effects payable, transferable or deliverable to him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answer-

(*a*) See *Elliot v. Merryman*, Wh. & T. L. C., Vol. I., and notes thereto. (*c*) 44 & 45 Vict. c. 41, s. 36, sub-s. 1; and cf. Lord Cranworth's Act (23 & 24 Vict. c. 145), s. 29.

(*b*) 56 & 57 Vict. c. 58.

(*d*) 56 & 57 Vict. c. 53, s. 50.

able for any loss or misapplication thereof." Sect. 40 of the Settled Land Act, 1882 (*e*), contains a similar provision with regard to receipts by Settled Land Act trustees.

Mortgagees.—Where mortgagees are parties to the conveyance, and one or more of the original mortgagees is dead, it is necessary, in the case of mortgages made before the Conveyancing Act, to see whether there was a proper *joint account clause* in the mortgage deed.

In the absence of a joint account clause, the presumption in equity is that the money was advanced in equal shares; and even if the language of the deed rebuts this presumption, the purchaser can require evidence that the joint tenancy has not been severed.

It should be borne in mind that a joint tenancy may be severed by a mere agreement between the joint owners, although the matter rests *in fieri* (*f*), and such an agreement may be inferred from a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common (*g*).

A covenant in a marriage settlement to settle after-acquired property is sufficient to sever a joint tenancy; but the marriage of a female joint-tenant does not of itself effect a severance (*gg*).

With regard, however, to mortgages executed since the 31st December, 1881, it is enacted (*h*) that "where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to

(*e*) 45 & 46 Vict. c. 38.

(*gg*) *Hewett v. Hallett*, (1894) 1

(*f*) *Gould v. Kemp*, 2 M. & K. 810. Ch. 362; *Palmer v. Rich*, (1897) 1 Ch. 134.

(*g*) *Williams v. Hensman*, 1 J. & H. 546. (*h*) 44 & 45 Vict. c. 41, s. 61.

be advanced by or owing to more than one out of money, or as money belonging to them on a *joint account*, or a mortgage, or such an obligation, or such a transfer, is made to more persons than one *jointly*, and not in shares, the mortgage money or other money or money's worth for the time being due to those persons on the mortgage or obligation shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, *as between them and the mortgagor or obligor*; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account."

This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained (*i*).

It is usual and proper, when a mortgage is made to trustees, to keep the trusts off the face of the mortgage deed, and to introduce a recital that the persons who are in fact trustees are entitled to the mortgage money on a joint account. The Court will not look behind this recital into the trusts affecting the mortgage money; and the purchaser need not concern himself as to the nature of those trusts (*j*).

But if the vendor inadvertently discloses the fact that

(*i*) 44 & 45 Vict. c. 41, s. 61, and *Rickmansworth Rail Co.*, 24 C. sub-s. 2. D. 720.

(*j*) *In re Harman and Uxbridge*

the mortgagees are trustees of a particular settlement, the purchaser is entitled to an abstract of the settlement so as to show that the mortgagees were duly appointed trustees, and are in a position to give a valid receipt for the mortgage moneys (*k*).

With regard to *mortgagees selling* under the powers conferred by the Conveyancing Act, 1881 (*l*), it is enacted that "the receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage (*m*). Lord Cranworth's Act contains a similar provision (*n*).

Heir or Devisee.—Before concluding this section, it is necessary to consider the case of a sale by an heir or beneficial devisee, where the land is charged with the payment of debts or legacies.

Sect. 18 of Lord St Leonards' Act, which deals with the case of a beneficial devisee, as opposed to a devisee in trust, provides that sects. 14, 15, and 16 of that Act (to which we have before referred) (*o*) shall not "extend to a devise to any person in fee or in tail or for the testator's whole estate and interest charged with debts and legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they *may by law now do*." Notwithstanding this enactment, if the devisee

(*k*) *Re Blaiberg and Abrahams*,
(1899) 2 Ch. 340.

(*l*) See Chap. VI., s. 6.

(*m*) 44 & 45 Vict. c. 41, s. 22.
(*n*) 23 & 24 Vict. c. 145, s. 12.
(*o*) *Supra*, p. 68.

of real estate charged with the payment of debts is not also executor, it is probably still the duty of the purchaser, when the testator died prior to the Land Transfer Act, 1897, to see that the purchase-money is properly applied (*p*), unless the executors concur in the sale, or have released the property by a deed which recited that all the debts had been duly discharged (*q*). On the other hand, where debts were not expressly charged on real estate, the heir or devisee could sell free from debts (whether simple or specialty) and thereupon the heir or devisee became personally liable for them to the extent of the value of the land aliened (*r*). Now, as we have seen, all freehold land descends in the first place to the executors under the Land Transfer Act, 1897; but under sect. 3, sub-sect. 1 of that statute the executors may convey to the heir or devisee "subject to a charge for the payment of any money which the personal representatives are liable to pay." If the conveyance has been made in this form, it is conceived that the purchaser from the heir or devisee should either require evidence of payment of the debts of the deceased, or obtain the concurrence of the executors.

It is believed that conveyances to heirs or devisees subject to a vague charge of this kind have frequently been made since the Land Transfer Act came into force, although such a practice seems highly objectionable (*s*).

(*p*) *Corser v. Cartwright*, L. R., 7 H. L. 737 and 741; but cf. dictum of Kay, L. J., in *Re Wilson*, 34 W. R. 512.

(*q*) *Storry v. Walsh*, 18 Beav. 559.

(*r*) *Re Hedgely*, 34 C. D. 379. The lord claiming by escheat or a voluntary assignee of the heir or devisee

is equally liable, *Re Hyatt*, 38 C. D. 609.

(*s*) The construction of s. 3, sub-s. 1 is extremely difficult, nor is it clear what are "the liabilities in respect of the land" to which this sub-section refers.

SECTION 2.

Execution of the Conveyance.

Attendance of Vendor.—It is unusual for the vendor personally to attend the completion of the purchase, but the purchaser, prior to the 1st January, 1882, was entitled to require the conveyance to be executed *in the presence of his solicitor*. Sect. 8 of the Conveyancing Act, 1881, now provides that “on a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor as such, but shall be entitled to have at his own cost the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.”

In practice the conveyance is now executed by the vendor, and handed to his solicitor as an escrow (*t*). The solicitor fills in the date, and delivers the deed to the purchaser on receiving the purchase-money.

Execution by Vendor.—The parties in whom the estate is vested should themselves execute the conveyance to the purchaser, or if the estate is of copyhold tenure, surrender in person (*u*). It was formerly held that a purchaser was not bound to accept an execution under a power of attorney (*v*); but it is submitted that he would now be bound to do so if the power of attorney came within the provisions of sects. 8 or 9 of the Conveyancing Act, 1882 (*w*). The conveyance of a married woman’s interest

(*t*) *Walker v. Ware Rail. Co.*, 35 Beav. 52.

(*v*) *Wallace v. Cook*, 5 Esp. 117.

(*u*) *Mitchel v. Neale*, 2 Ves. sen. 679; *Noel v. Weston*, 6 Mad. 50.

(*w*) 45 & 46 Vict. c. 39; see

supra, p. 197.

in real estate under a power of attorney was formerly inoperative (*x*) ; but now the Conveyancing Act, 1881, sect. 40, provides that a married woman, whether an infant or not, shall have power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. There is now no reason why any married woman may not execute a power of attorney, although her separate property may be subject to a restraint on anticipation ; but, of course, she cannot get rid of the restraint on anticipation by executing any such power (*y*) ; nor can she by so doing dispense with an acknowledgment when one would otherwise be necessary (*z*).

If the conveyance contains covenants by the purchaser, he should execute the deed, although it is probable that his non-execution would be no defence after he has accepted the benefit of the conveyance.

A mortgagee is not bound to reconvey before the time fixed for redemption (*a*), and he cannot be compelled to transfer by any other description than that under which the property was vested in him (*b*).

Where mortgagees are trustees, and it is proposed that they should join in order to release a *portion* of the security, it should be seen that they have power to vary investments (*c*).

A trustee of an outstanding legal estate must convey upon request of the party entitled to a conveyance, but he is not

(*x*) *Graham v. Jackson*, 6 Q. B. 611.

(*a*) *Brown v. Cole*, 14 Sim. 427.

(*y*) *Stewart v. Fletcher*, 88 C. D.

(*b*) *Goodson v. Ellison*, 3 Russ. 594.

at p. 628.

(*c*) *Dart*, V. & P. 690.

(*z*) *Wolstenholme*, p. 93.

bound from time to time to convey different parcels of the trust estate (*d*).

Any one of several executors may, during the life of his co-executors, perform without their concurrence the ordinary acts of administration, and may accordingly alone make a valid assignment of a chattel interest in real estate (*e*). An assignment by an executor who dies before probate is granted to him is valid (*f*); but it is not so in the case of a person who is entitled to take out letters of administration, but has not done so, even though he subsequently obtains a grant (*g*).

When the sale is by trustees, they must all join in the receipt for the purchase-money (*h*), and where a testator has contracted to sell, the purchase-money must be paid to his executor (*i*).

Incumbrances which would affect the property in the hands of a purchaser must be removed by the vendor or be paid off out of the purchase-money, and any assignee of the unpaid purchase-money would take subject to the purchaser's right in this respect (*j*), and until completion of the purchase the vendor will remain liable for all defects (*k*). The Conveyancing and Law of Property Act, 1881, sect. 5, provides:—

“5.—(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged

(*d*) *Hampshire v. Bradley*, 2 Coll. 34.

(*h*) *Sugd. V. & P.* 664.

(*e*) *Simpson v. Gutteridge*, 1 Mad. 609, *supra*, p. 66.

(*i*) *Eaton v. Sanxter*, 5 Sim. 517.

(*f*) *Brazier v. Hudson*, 8 Sim. 67.

(*j*) *Lacey v. Ingle*, 2 Phill. 413; *Greenwood v. Taylor*, 14 Sim. 505.

(*g*) *Wms. Exors.* 390.

(*k*) *Dart, V. & P.* 591.

on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon ; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made" (l).

SECTION 3.

Payment of Purchase-Money to Vendor's Solicitor.

Formerly, when the vendor was not present at completion to receive the purchase-money, the purchaser was entitled, notwithstanding the receipt upon the deed, to be furnished with a written request directed to him and

(l) As to the interpretation of this section, see *Re Freme's Contract*, (1895) 2 Ch. 261.

signed by the vendor for payment of the purchase-money to his solicitor. Sect. 56 of the Conveyancing Act (*m*) now provides that "when a solicitor produces a deed having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay the same, for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt." The solicitor producing the deed must be the solicitor *acting for the vendor*, and it is not sufficient that the deed is in his office if he does not actually produce it (*n*).

It is conceived that payment to the clerk of the vendor's solicitor would not come within the protection afforded by this section.

When the vendors were trustees, it was the duty of the purchaser, prior to the Trustee Act, 1888 (*o*), to pay the purchase-money to the trustees personally, or to their joint account at a bank. It is now provided by sect. 17 of the Trustee Act, 1893 (*p*) (which re-enacts sect. 2 of the Trustee Act, 1888), that "a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to

(*m*) 44 & 45 Vict. c. 41.

(*n*) *Day v. Woolwich Equitable Building Society*, 40 C. D. 491 ; but cf. *King v. Smith*, (1900) 2 Ch. 425.

It is conceived that the purchaser

cannot safely pay the purchase-money to the *clerk* of the vendor's solicitor.

(*o*) 51 & 52 Vict. c. 59.

(*p*) 56 & 57 Vict. c. 58.

have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881."

If the solicitor of the trustees produces a deed having in the body thereof, or indorsed thereon, a receipt by the trustees for the consideration money, the purchaser is not entitled to require proof that the solicitor has, in fact, been appointed to receive the purchase-money under sect. 17, unless there are suspicious circumstances (*q*). It must, however, be remembered that the solicitor must be appointed agent for the *particular transaction*, since a trustee cannot delegate to others his general duties as trustee (*r*). The purchase-money should be paid in cash or notes or by banker's drafts. In some cases the vendor's solicitor accepts a cheque, but if he parts with the title-deeds and conveyance before he has satisfied himself that the cheque will be honoured, he does so at his own risk (*s*).

The question of handing over title-deeds upon completion has already been dealt with in discussing conditions of sale (*ss*).

SECTION 4.

Form of Receipt.

Prior to the Conveyancing Act, 1881, the receipt for the purchase-money *in the body of the deed* was not considered sufficient, on the ground, apparently, that the deed might

(*q*) *In re Helling and Merton's Contract*, (1898) 3 Ch. 269, at p. 280. (*s*) *Papé v. Westacott*, (1894) 1 Q. B. 278.

(*r*) *In re Helling and Merton, supra*. (*ss*) *Supra*, p. 282,

have been delivered as an escrow (*t*). Deeds executed before the 1st January, 1882, must have a further receipt *indorsed* on the upper of the squares formed by folding the parchment.

With regard, however, to deeds executed since the Conveyancing Act came into operation, it is provided by sect. 54 of that Act that a receipt for consideration money or securities *in the body of a deed* shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed. Sect. 55 of the same Act provides that, in the case of deeds executed after the 31st December, 1881, a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser *not having notice* that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

A purchaser is protected by this section, even although he has not got the legal estate (*u*).

Companies and public bodies generally have a special form of receipt, signed by their authorised agent, which is indorsed on the deed.

(*t*) *Bickerton v. Walker*, 31 C. D. at p. 159. (*u*) *Lloyd's Bank, Limited v. Bullock*, (1896) 2 Ch. 192.

CHAPTER XX.
STAMP DUTIES.

SECTION 1.

Stamp on Conveyances.

By the Stamp Act, 1891 (*a*), conveyances on sale of real or leasehold property made after the 1st January, 1892, are chargeable with the following duties:—

						£ s. d.
Where the amount or value of the consideration for the sale does not exceed £5	...	...	...	...	0	0 0 6
Exceeds £5 and does not exceed £10	...	...	...	0	1	0
" 10 "	"	15	...	0	1	6
" 15 "	"	20	...	0	2	0
" 20 "	"	25	...	0	2	6
" 25 "	"	50	...	0	5	0
" 50 "	"	75	...	0	7	6
" 75 "	"	100	...	0	10	0
" 100 "	"	125	...	0	12	6
" 125 "	"	150	...	0	15	0
" 150 "	"	175	...	0	17	6
" 175 "	"	200	...	1	0	0
" 200 "	"	225	...	1	2	6
" 225 "	"	250	...	1	5	0
" 250 "	"	275	...	1	7	6
" 275 "	"	300	...	1	10	0
" 300 "						
For every £50 and also for every fractional part of £50 of such amount or value	...	...	...	0	5	0

The term *conveyance on sale* includes every instrument and every decree or order of any Court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in a purchaser

(*a*) 54 & 55 Vict. c. 39. The previous Act of 1870 (33 & 34 table is the same as under the Vict. c. 97).

or any other person on his behalf or by his direction (*b*). A mere *receipt* endorsed on an equitable mortgage does not require to be stamped as a reconveyance.

Voluntary conveyances of real property, and conveyances for effectuating the appointment of a new trustee, do not require *ad valorem* stamp duty. In such cases a deed stamp of 10s. is sufficient (*c*).

Where there are several conveying parties having separate interests in the same property, only one stamp is necessary, and where a mortgagee joins in a conveyance, the deed is not chargeable with "reconveyance" duty in addition to the *ad valorem* sale duty. Where, however, separate interests in separate property are conveyed *by* several parties in one instrument, or where separate properties are conveyed *to* several parties by one instrument, several stamps are requisite (*d*).

An instrument which contains two or more operative parts, each falling under a specific head of charge, must be stamped with the appropriate duty for each operation (*e*) ; but a conveyance on sale is not chargeable with additional duty in respect of a covenant by the purchaser to make improvements on, or additions to, the property conveyed to him (*ee*).

SECTION 2.

Consideration, how ascertained.

The *ad valorem* stamp duty must be paid on the true consideration for the sale, and upon the price of all pro-

(*b*) 54 & 55 Vict. c. 39, s. 54.

(*e*) *Hadgett v. Commissioners of*

(*c*) *Ib.* s. 62.

Inland Revenue, 3 Ex. D. 46.

(*d*) *Alpe on Stamp Duties*, p. 108.

(*ee*) 63 Vict. c. 7, s. 10.

perty passing by the conveyance (*f*). The consideration for a conveyance on sale is usually a gross sum of money, but it may also consist of stock or securities, of periodical payments, such as an annuity, of a debt due from the vendor to the purchaser, or a liability of the vendor undertaken by the purchaser.

The Stamp Act, 1891 (*g*), makes the following provisions with regard to these different kinds of consideration.

When the consideration, or any part of the consideration, for a conveyance on sale consists of any *stock* or marketable security, the conveyance is to be charged with *ad valorem* duty in respect of the value of the stock or security (*h*). The duty is to be calculated on the value on the day of the date of the instrument of the money in British currency according to the current rate of exchange, or of the stock or security according to the average price thereof (*i*). Where stocks or securities are not quoted, their value must either be taken at par, or based on an average of the latest private transactions (*j*).

When the consideration, or any part of the consideration, for a conveyance on sale consists of any security *not being a marketable security*, the conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon the security (*k*).

When the consideration, or any part of the consideration, for a conveyance on sale consists of money payable

(*f*) 54 & 55 Vict. c. 39, ss. 5 and
12.

(*g*) *Ib.* ss. 55, 56, 57.

(*h*) *Ib.* s. 55, sub-s. 1.

(*i*) *Ib.* s. 6, sub-s. 1.

(*j*) Alpe on Stamp Duties, p. 21.

(*k*) 54 & 55 Vict. c. 39, s. 55,
sub-s. 2.

PERIODICALLY, for a definite period *not exceeding twenty years*, so that the total amount to be paid can be previously ascertained, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on such total amount (*l*).

When the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period, *exceeding twenty years* or in perpetuity, or for any indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with *ad valorem* duty on the total amount which will, or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument (*m*).

When the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically *during any life or lives*, the conveyance is to be charged in respect of such consideration with *ad valorem* duty on the amount which will or may according to the terms of sale be payable during the period of twelve years next after the day of the date of the instrument (*n*).

Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing such periodical payments, is to be charged with any duty whatsoever in respect of such provision, and no separate instrument made in any such case for securing such periodical pay-

(*l*) 54 & 55 Vict, c. 89, s. 56,
sub-s. 1.

(*m*) *Ib.* s. 56, sub-s. 2.
(*n*) *Ib.* s. 56, sub-s. 3.

ments is to be charged with any higher duty than ten shillings (o).

When the purchase-money is payable by instalments, with interest in default of payment, no further duty is chargeable (p); but if the payment of the purchase-money is secured by a mortgage of the property by the purchaser to the vendor, the deed must be stamped as a mortgage as well as a conveyance on sale (q).

When a person sells part of a leasehold property apportioning the rent between himself and the purchaser with mutual covenants for indemnity, the covenant by the assignee is not part of the consideration for the assignment, and no additional duty is chargeable (r).

When any property is conveyed to any person in consideration wholly or in part of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (s).

SECTION 3.

Conveyance by separate Instruments.

Where property contracted to be sold for one consideration for the whole is conveyed to the purchaser

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|--|--|
| (o) 54 & 55 Vict. c. 39, s. 56,
sub-s. 4. | (q) Dart, V. & P. 796.
(r) <i>Swayne v. Inland Revenue</i> ,
(1899) 1 Q. B. 335. |
| (p) <i>Limmer Asphalte Co. v. Commissioners of Inland Revenue</i> , L. R.,
7 Ex. 216. | (s) 54 & 55 Vict. c. 39, s. 57. |

in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration (*t*).

Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others, or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified (*u*).

Where there are several instruments of conveyance for completing the purchaser's title to property sold, the *principal instrument* of conveyance only is charged with *ad valorem* duty, and the other instruments are to be respectively charged such other duty as they may be liable to, but the last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument (*v*). Except in the case of copyholds, the parties may determine which of several instruments is to be deemed the principal instrument (*w*).

(t) 54 & 55 Vict. c. 39, s. 58,
sub-s. 1.

(v) *Ib.* s. 58, sub-s. 3.

(u) *Ib*, sub-s. 2.

SECTION 4.

Sub-sales.

Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the consideration moving from the sub-purchaser (*x*).

Where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole or any part or parts thereof to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration (*y*).

Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him, and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be chargeable only with a ten-shilling duty, or, if the *ad valorem* duty would be less than ten shillings, with such less amount (*z*).

(*x*) 54 & 55 Vict. c. 39, s. 58,
sub-s. 4.

(*y*) *Ib.* s. 58, sub-s. 5.
(*z*) *Ib.* s. 58, sub-s. 6.

SECTION 5.

Copyholds (a).

Where an *equitable* interest in copyholds is conveyed, the covenant to surrender must be stamped with *ad valorem* duty (b).

In other cases the surrender or grant, if made *out of Court*, or the memorandum thereof, and the copy of the Court roll of the surrender or grant, if made *in Court*, is to be deemed the principal instrument (c). An *admittance* to copyholds is not liable to stamp duty.

Where freeholds and copyholds are conveyed together the consideration should be apportioned.

The copy of Court roll of a surrender or grant made out of Court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant or the memorandum thereof is duly stamped, of which fact the certificate of the steward of the manor on the face of such copy shall be sufficient evidence (d).

The entry upon the Court rolls of a surrender or grant shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant, if made out of Court, or the memorandum thereof, or the copy of Court roll of the surrender or grant, if made in Court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence (e).

(a) See also Scriven on Copy-holds, 7th ed., 1896. (c) *Ib.* s. 61, sub-s. 1 (b).

(b) 54 & 55 Vict. c. 39, s. 61, (d) *Ib.* s. 65, sub-s. 2.

sub-s. 1 (a). (e) *Ib.* s. 65, sub-s. 3.

No instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof several fines and fees are due to the lord or steward of the manor (*f*).

All the facts and circumstances affecting the liability to *ad valorem* duty of the copy of Court roll of any surrender or grant made in Court, or the amount of *ad valorem* duty with which any such copy of Court roll is chargeable, are to be fully and truly stated in a *note* to be delivered to the steward of the manor before the surrender or grant is made (*g*).

The steward of every manor shall refuse to accept in Court any surrender, or to make in Court any grant, until such a note as aforesaid has been delivered to him, or to enter on the Court rolls, or accept any presentment of or admit any person to be tenant under or by virtue of any surrender or grant made out of Court, or any deed which is not duly stamped (*h*).

The steward of every manor shall, within four months from the day on which any surrender or grant is made in Court, make out a duly stamped copy of Court roll of such surrender or grant, and have the same ready for delivery to the person entitled thereto, and if he neglects so to do, shall forfeit the sum of £50 and the duty payable in respect of the copy of Court roll shall be a debt to Her Majesty from the steward, whether he shall have received it or not, and if he has not received the duty, the

(*f*) 54 & 55 Vict. c. 39, s. 65, sub-s. 1. imposes a fine of £50 on the steward or any other person who attempts to evade these provisions.

(*g*) *Ib.* s. 66, sub-s. 1.

(*h*) *Ib.* s. 66, sub-s. 2. The Act

same shall also be a debt to Her Majesty from the party entitled to the copy (*i*).

The steward of any manor may, before he accepts in Court any surrender or makes in Court any grant, demand and insist on the payment of his lawful fees in relation to the surrender or grant, together with the duty payable on the copy of Court roll thereof, and may refuse to proceed in the matter, or to deliver the copy of Court roll to any person, until the fees and duty are paid (*j*).

An enfranchisement deed is stamped with *ad valorem* conveyance duty, and so also in an enfranchisement Award (*k*).

SECTION 6.

Stamp on Covenants.

Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of or the title to the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid, where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed ten shillings, is chargeable with a duty equal to the amount of such *ad valorem* duty, and in any other case with a duty of ten shillings.

(*i*) 54 & 55 Vict. c. 39, s. 67.

(*j*) 54 & 55 Vict. c. 39, s. 68.

(*k*) 57 & 58 Vict. c. 46, s. 58,

sub-s. 2; 15 & 16 Vict. c. 51, s. 32.

CHAPTER XXI.
REGISTRATION, ENROLMENT, ETC.

SECTION I.

Registration of Title.

When Compulsory.—If the property sold is of freehold or leasehold tenure, and is situate *within the County of London*, it is now necessary (subject to the exceptions hereafter mentioned) for the purchaser to register a possessory title. If he neglects to do so, the legal estate notwithstanding, the conveyance remains in the vendor (*a*).

Registration is not, however, compulsory in the case of—

- (1.) Incorporeal hereditaments.
- (2.) Mines or minerals apart from the surface.
- (3.) Leases having *less than forty years* to run or two lives to fall in.
- (4.) Undivided shares of land.
- (5.) Freeholds intermixed and undistinguishable from lands of other tenure (*b*).
- (6.) Corporeal hereditaments parcel of a manor and included in the sale of a manor as such (*c*).

Moreover, it must be remembered that the Land Transfer Acts do not apply to copyholds, or to customary

(*a*) 60 & 61 Vict. c. 65, s. 20. of the Land Transfer Act, 1875.

(*b*) Lands of mixed tenure, may, (*c*) 60 & 61 Vict. c. 65, s. 24.
if desired, be registered ; see s. 67

freeholds where admission or any act by the lord of the manor is necessary to perfect the title of a purchaser (*d*), or to underleases originally created for mortgage purposes (*e*), or to leaseholds subject to an absolute prohibition against alienation (*f*).

Registration became compulsory in the *County of London*, as follows, viz.:—

- (1.) In the parishes of **Hampstead**, **St Pancras**, **St Marylebone** and **St George's, Hanover Square**, on *1st November*, 1898.
 - (2.) In the parishes of **Shoreditch**, **Bethnal Green**, **Mile End**, **Old Town**, **Wapping**, **St George's in the East**, **Shadwell**, **Ratcliff**, **Limehouse**, **Bow**, **Bromley**, and **Poplar**, on *1st March*, 1899.
 - (3.) In the remainder of the county (not including the City of London) north of the centre line of the River Thames, except **North Woolwich**, on *1st October*, 1899.
 - (4.) In the remainder of the county (not including the City of London) on *1st January*, 1900.
 - (5.) In the City of London, on *1st July* 1900.

SECTION 2.

Procedure for Registering a Possessory Title.

Form of Application.—Application for registration with a possessory title must be made by delivering at the Registry a written application in the following form:—

(d) 60 & 61 Vict. c. 65, s. 1,
sub-s. 4.

(e) *Ib.* First Schedule.

(f) 38 & 39 Vict. c. 87, s. 11.

Land Registry.

(*Land Transfer Acts, 1875 and 1897.*)

"I, A. B., of etc., hereby apply to be registered as a proprietor with possessory title of the land in the parish of , shown and edged with red on the accompanying plan (or comprised in the accompanying deed or any other particulars sufficient to enable the land to be fully identified on the Ordnance map), the value of which, with all buildings and timber thereon, does not to the best of my belief exceed £ ."

Where it is desired that a particular verbal description be entered in the register, add—"I also desire the following verbal description to be entered on the register."

(*Fill in the proposed verbal description.*)

To be signed by the applicant or his solicitor.

What Documents Necessary.—The application must be accompanied by either a conveyance on sale to the applicant or a statutory declaration by the applicant or his solicitor, together with the latest document of title (if any) in the possession or under the control of the applicant (g).

SECTION 3.**Registration of Deeds.**

When land situate within the jurisdiction of any of the local registries is registered under the Land Transfer

(g) Land Transfer Rules, (1898) rule 17.

Acts, it is exempt from such jurisdiction *from and after the date of registration thereof*; and no document relating to any such registered land executed, and no testamentary instrument relating to any such registered land coming into operation, subsequently to such date as aforesaid, shall be required to be registered in any of the local registries (*h*). Where the land included in any application for registration is subject to the jurisdiction of the Middlesex or Yorkshire registries of deeds, the registration shall be deemed for the purpose of removing the land from that jurisdiction to have taken place *at the beginning of the day* on which the application is delivered at the land registry, and prior to any registration on that day of a memorial in the local deed registry (*i*). Moreover, registration of a possessory title in Middlesex is equivalent to the registration of a memorial of the conveyance (*j*).

SECTION 4.

Memorials in Local Registries.

A memorial of a conveyance must be under the hand (*k*) of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians or trustees, attested by one witness. The witness to the memorial must be a witness to the original

(*h*) Land Transfer Act, 1875, s. 127.

(*i*) Land Transfer Rules, 1898, rule 24.

(*j*) 54 & 55 Vict. c. 64. First Schedule, par. 14.

(*k*) It is no longer necessary to seal any memorials in Middlesex (see Middlesex Rules, 1892, rule 5); but a seal would still appear to be necessary in Yorkshire.

document, unless at the date of the memorial every such witness is dead or absent from the United Kingdom, or cannot be found, or some other sufficient cause exists to prevent it.

Every memorial must contain the address and description of the witness to the memorial (*l*), and also in so far as the same appear from the original instrument must mention (1) the date of the conveyance; (2) the names and additions of all parties to the deed, and when practicable the places of their abode; (3) the lands and hereditaments contained in the conveyance, and the parishes in which they are situate. When the original instrument contains a plan, a copy thereof shall be drawn in the memorial, unless owing to its size this cannot be done; in which case a tracing on linen signed by the person signing the memorial and by one witness shall be left with the memorial and filed in the office (*m*). A memorial is charged with a 2s. 6d. Inland Revenue stamp, and a 5s. Land Registry stamp.

SECTION 5.

Assurances to Charitable Uses.

The statute 9 Geo. II. c. 36 prohibited the assurance of land for charitable uses except upon certain conditions.

This Act is now repealed by the Mortmain and Charitable Uses Act, 1888 (*n*).

The Act of 1888 lays down the conditions under which assurances to charitable uses may be made, both as to

(*l*) Middlesex Rules, rule 5,

(*n*) 51 & 52 Vict. c. 42,

(*m*) *Ib.* rule 4.

the nature of the assurance and the manner in which it is to be carried out.

Nature of the Assurance.—With regard to the nature of the assurance, the Act provides that—

1. The assurance must be made to take effect *in possession* for the charitable uses to or for the benefit of which it is made immediately from the making thereof (*o*).
2. The assurance must be *without any power of revocation* (*p*).
3. The assurance must not contain any reservation, condition, or provision for the benefit of the assuror, or any person claiming under him (*p*), with the exception of certain stipulations mentioned in sect. 4, sub-sect. 4; and also with the exception that, in the case of a sale, the consideration may consist of a rent, rent-charge, or other annual payment (*q*).

Manner in which Assurance must be carried out.—With regard to the manner in which the assurance is to be carried out, the Act provides that—

1. The assurance must be by deed executed in the presence of at least *two witnesses*, except in the case of copyholds (*r*).
2. The assurance must be made at least twelve months before the death of the assuror (*s*).
3. The assurance must *within six months* after execution be *enrolled* in the Central Office of the Supreme Court, unless the charitable uses are declared by

(*o*) 51 & 52 Vict. c. 42, s. 4, sub-s. 2; see *Fisher v. Brierley*, 10 H. L. C. 540. (*g*) *Ib.* s. 4, sub-s. 5. (*r*) *Ib.* s. 4, sub-s. 6. (*s*) *Ib.* s. 4, sub-s. 7. (*p*) *Ib.* s. 4, sub-s. 3.

a separate instrument, in which case that separate instrument must be enrolled within six months after the making of the assurance of the land (*t*).

Non-enrolment.—Where there has been an omission to enrol the deed of assurance in proper time through ignorance or inadvertence, it may be subsequently enrolled upon payment of the proper fees, provided that the deed was made in good faith for valuable consideration, and complied with the conditions to which we have already referred ; and provided that there are no proceedings pending to set aside the conveyance (*u*). It appears that a *voluntary* conveyance to charitable uses cannot be subsequently enrolled.

It must be borne in mind that enrolment will not be presumed even after the lapse of many years (*v*).

The grantor is not estopped from setting aside a deed which has not been duly enrolled (*w*).

The conditions with regard to assurances to charitable uses which we have detailed do not apply in the following cases :—

- I. An assurance of land already in mortmain (*x*).
- II. An assurance for the purposes only of a public park, a school-house for an elementary school, or a public museum ; provided that the deed of assurance is executed twelve months before the death of the assuror, and is enrolled *in the books of the Charity Commissioners* within six months after execution, unless made in good faith and for valuable consideration (*y*).

(*t*) 51 & 52 Vict.c. 42, s. 4, sub-s. 8.

(*w*) Tudor on Charities, p. 396.

(*u*) *Ib.* s. 5, sub-s. 1, 2 and 3.

(*x*) *Ashton v. Jones*, 28 Beav.

(*v*) *Doe v. Waterton*, 3 B. & Ald.

460.

(*y*) 51 & 52 Vict. c. 42, s. 6.

- III. An assurance by deed to any local authority for any purpose for which such authority is empowered by any Act of Parliament to acquire land (z). It would seem that enrolment in the books of the Charity Commissioners is also necessary in this case, unless the conveyance is for value.
- IV. An assurance of land in trust for any of the five Universities (Oxford, Cambridge, London, Durham, and Victoria), or any of the colleges or houses of learning therein, or in trust for any of the colleges of Eton, Winchester, and Westminster (a).
- V. An assurance of land not exceeding *two acres* made in good faith and for valuable consideration for the promotion of education, art, literature, science, or other like purposes (b).

Assurances by Will.

With regard to *wills*, it may be mentioned in this connection that land may be devised, or personal estate to be applied in the purchase of land may be bequeathed, for the purposes only of a public park, a school-house for an elementary school, or a public museum ; provided that the will is executed twelve months before the testator's death, and is enrolled within six months after his death *in the books of the Charity Commissioners*, and provided that the

(z) 55 Vict. c. 11, s. 1; and cf. sub-s. 1.
p. 51, *supra*. (b) *Ib.* s. 7, sub-s. 2
(a) 51 & 52 Vict. c. 42, s. 7,

quantity of land does not exceed *twenty acres* for any one public park, *two acres* for any one public museum, and *one acre* for any one school-house (*c*).

A devise of land, or a bequest of personalty to be laid out in the purchase of land, for the benefit of a charitable use, other than the above-mentioned charities, is void if the testator died before the 5th August, 1891 (*d*). In the case of a testator dying since that date, such devise or bequest is not void, but the land must be sold within *one year from the testator's death*, and the personalty is held for the benefit of the charity as though there had been no direction to lay it out in the purchase of land (*e*). The High Court and the Charity Commissioners may sanction the retention or acquisition of land which is required for *actual occupation* for the purposes of the charity (*f*).

SECTION 6.

Enrolment of Assurances of Crown Lands.

The conveyances or assurances of Crown lands, when enrolled in the office of land revenue records and enrolments, are exempt from enrolment in Courts of Law or Equity, or registration in any local registry (*g*), and are also exempt from stamp duty.

(*c*) 51 & 52 Vict. c. 42, s. 6.

(*d*) *Ib.* s. 4, sub-s. 1.

(*e*) 54 & 55 Vict. c. 73, ss. 5, 6, and 7.

(*f*) *Ib.* s. 8.

(*g*) 53 Geo. III. c. 121; 2 Will.

IV. c. 1; 16 & 17 Vict. c. 56, s. 6; and as to enrolment of instruments of enfranchisement in Crown manors, see 57 & 58 Vict. c. 46, s. 71.

SECTION 7.

Notice.

It should also be considered whether there are any persons to whom notice of the execution of the assurance should be given.

On the purchase of an equitable estate notice should be given to the persons having the legal estate, particularly in the case of an equity of redemption, to prevent further advances being made by the mortgagee to the mortgagor.

Notice of the conveyance should be given to tenants, since in the absence of notice the purchaser cannot recover rent which the tenant may subsequently pay to the vendor.

And on taking an assignment of leaseholds the lease should be carefully perused, in order to ascertain if there is any provision requiring notice thereof to be given to the lessor.

SECTION 8.

As to Right of Purchasers to Benefit of Rent and Covenants.

Assignment of Reversions.—When property is purchased subject to a lease (*h*), the purchaser is entitled to the benefit of the lessee's covenants with the vendor, and may recover the rent due on the quarter day next after the conveyance. The purchaser cannot, however, recover arrears of rent which become due prior to the conveyance of the reversion, since they are severed from the reversion and become a mere chose in action (*i*). It would also

(*h*) Formerly under 32 Hen. VIII., c. 34, the lease had to be under seal (see *Standen v. Christmas*, 10 Q. B. 135); but since the Convey-

ancing Act, this does not seem to be necessary.

(*i*) *Flight v. Bentley*, 7 Sim. 151.

seem (notwithstanding the statement in Dart (*j*) to the contrary), that the purchaser cannot sue upon breaches of covenant which occurred before conveyance, unless the breach is a continuing one (*k*), and it is clearly established that he cannot enforce a condition for re-entry in respect of such breaches (*l*).

After completion the rule applies that notice of a lease is notice of its contents (*m*), and if the purchaser has notice of a tenancy, he is bound by all the equities which the tenant could enforce against the vendor (*n*).

But a purchaser is only affected by the equities which the *tenant* can insist on, and notice of the tenancy is not notice of the title of the lessor. An intending purchaser is not bound to inquire of the tenants to whom they pay their rents, and is not affected with constructive notice that the vendor is out of possession or that he is trustee for some third party (*nn*).

With regard to leases made after the 31st December, 1881, the Conveyancing and Law of Property Act, 1881, contains the following provisions :—

10.—(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding

(*j*) *Dart, V. & P.* 916.

prior to completion, see *supra*, pp. 23, 24.

(*k*) *Martyn v. Williams*, 26 L.J. Ex. 120.

(*n*) *Lewis v. Stephenson*, 67 L.J. Q.B. 296; *Dart, V. & P.* p. 975.

(*l*) *Cohen v. Tanner*, (1900) 2 Q.B. 612.

(*nn*) *Hunt v. Luck*, ex.; *Law Times Newspaper*, p. 112.

(*m*) This rule does not apply

standing severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2) This section applies only to leases made after the commencement of this Act.

11.—(1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2) This section applies only to leases made after the commencement of this Act.

Severance of the Reversion.—At common law the purchaser of the reversion in *a part* of demised premises could sue for apportioned rent, but could not take advantage of a condition broken. It was, however, enacted by Lord St Leonards' Act (o), "that when the reversion upon a lease is severed, and the rent or other reservation is *legally apportioned*, the assignee of each part of the reversion shall in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation in like manner as if such condition or powers had been reserved to him as incident to his part of the

(o) 22 & 23 Vict. c. 35, s. 3.

reversion in respect of the apportioned rent or other reservation allotted or belonging to him." With regard to leases made since the 31st December, 1881, it is now provided by the Conveyancing Act as follows:—

12.—(1) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cessor in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2) This section applies only to leases made after the commencement of this Act.

SECTION 9.

Lien for Unpaid Purchase-Money.

Notwithstanding the execution of the conveyance and delivery of possession, and though such conveyance may have a receipt for the purchase-money indorsed thereon, the vendor retains an equitable lien on the estate for the whole or any part of the purchase-money remaining unpaid, and a sub-purchaser or mortgagee will be postponed even without notice, unless he has the legal estate (*p*).

(*p*) Dart, V. & P. 825; *Mackreth v. Simmons*, 15 Ves. 329; Wh. & T. L. C., Vol. I. p. 355, and notes thereto.

The title-deeds may, however, be recovered by the purchaser at law after conveyance of the estate, even though the purchase-money be unpaid, unless the conveyance be executed as an escrow to be delivered on payment of the money (*q*).

The lien is generally lost, however, by taking an independent security for payment (*r*); but it will not be lost by the vendor taking a bond, bill of exchange, or promissory note, or other security which merely evidences or facilitates payment, even though a surety join therein (*s*).

The lien of the vendor is barred after twelve years (*t*).

SECTION 10.

Inadequate Consideration.

After conveyance the vendor will have no remedy if the property prove more valuable than it was supposed to be either in quantity or extent (*u*); but the Court has power to rectify a conveyance where there has been *common mistake*, as, for instance, where the conveyance comprises more than either party intended to deal with (*v*).

In *Bingham v. Bingham* (*w*), the conveyance was set aside on the ground of common mistake, as it appeared

- (*q*) *Goode v. Burton*, 1 Exch. 189; *Toft v. Stephenson*, 7 H. 1.
Austin v. Croome, 1 Car. & M. 653; (*u*) *Okill v. Whittaker*, 2 Ch. 888.
Harrington v. Price, 3 B. & Ad. 170. (*v*) *Thomas v. Davis*, 1 Dick. 301;
Marquess v. Marchioness of Exeter, 3 Myl. & C. 321.
(*r*) *Nairn v. Prowse*, 6 Ves. 752; (*w*) Ves. sen., Supplement, 79.
Capper v. Spottiswoode, Taml. 21; In 1 Ves. sen. 126, it is reported as
Bond v. Kent, 2 Vern. 281. an agreement to purchase, with no
(*s*) *Dart, V. & P.* 829.
(*t*) 37 & 38 Vict. c. 57, s. 8; mention of conveyance.

that the vendor had purported to sell property which in reality belonged to the purchaser. In that case there was a total failure of consideration.

A conveyance may also be set aside on the ground of fraud, as in *Hart v. Swaine* (*x*), where it was held that the vendor had committed a *legal fraud* by making a false statement for the purpose of benefiting himself. This decision was treated by Cotton, L. J., as a case of *deceit* (*y*). It is clear, however, that if a misrepresentation was made in good faith and believed to be true at the time it was made, this is no ground for relief *after the conveyance*, either by way of compensation or by setting aside the whole transaction (*z*).

The above remarks, however, only refer to the sale of estates *in possession* (*a*). In the case of sales by heirs, reversioners, or expectants, very different principles apply, and the Court will presume fraud from "the *circumstances or conditions* of the parties contracting" (*b*) ; as, for instance, the youth of the vendor, his imperfect education, or the fact that he is in distress for money.

Fraud in this class of cases does not necessarily mean deceit or circumvention ; "it means an unconscientious use of the power arising out of these circumstances and conditions ; and when the relative position of the parties is such as *prima facie* to raise this presumption, the trans-

(*x*) 7 C. D. 42 ; and cf. *Carpmael v. Powis*, 11 Jur. 158.

(*y*) *Soper v. Arnold*, 87 C. D. 102. It is now decided that there is no distinction between *legal* and *moral* fraud : see *Derry v. Peek*, 14 A. C.

347.

(*z*) *Brownlie v. Campbell*, 5 A. C. at p. 938.

(*a*) Cf. *Webster v. Cook*, 2 Ch. 542.

(*b*) See *Chesterfield v. Janssen*, Wh. & T. L. C., Vol. I. p. 624, and notes thereto.

action cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable (*c*).

Thus, in *Fry v. Lane* (*d*), where there was no evidence of actual fraud, the Court set aside the sale of a reversion by a poor and ignorant man at a considerable undervalue.

The Sales of Reversions Acts (*e*) enacts that "no purchase made *bond fide* and without fraud and unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside *merely on the ground of undervalue*." This Act does not affect the case of an undervalue so gross as to amount of itself to evidence of fraud, and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief (*f*).

The Court will also give relief, even when the estate is in possession, if the vendor is a poor and ignorant man, having no independent professional adviser, and has sold at a considerable undervalue (*g*).

(*c*) *Earl of Aylesford v. Morris*, *supra* : *O'Rorke v. Bolingbroke*, 2 8 Ch. 490.

A. C. 814.

(*d*) 40 C. D. 312.

(*g*) *Wood v. Abrey*, 3 Mad. 417;

(*e*) 31 Vict. c. 4.

Clark v. Malpas, 4 D. F. & J. 401;

(*f*) *Earl of Aylesford v. Morris*,

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